CURSE OF THE NEW BUFFALO: A CRITIQUE OF TRIBAL SOVEREIGNTY IN THE POST-IGRA WORLD*

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People are afraid to oppose the tribal council because so many of them now work at the casino... the council members run the casino, and the council members sign their paychecks. Anyone who challenges them pays for it. - Marty Silvas, former Tigua[1]

Think not forever of yourselves, O Chiefs, nor of your own generation. Think of continuing generations of our families, think of our grandchildren and of those yet unborn, whose faces are coming from beneath the ground.[2]

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1. Pamela Colloff, *The Blood of the Tigua*, TEX. MONTHLY, August 1999, at 112, 132.

2. *See* American Indian Research and Policy Institute, *Threats to Tribal Sovereignty Are Nothing New*, *at* http://www.airpi.org/st98notnew.html (last visited Oct. 3, 2000) (quoting HARVEY ARDEN & STEVE WALL, WISDOMKEEPERS: MEETINGS WITH NATIVE AMERICAN SPIRITUAL ELDERS (Beyond Words (1990)).

I. INTRODUCTION

It is difficult to place the history of interaction between the United States federal government and Native American tribes in any positive terms. Many of us grew up with the myth of Indians and White settlers living amicably as neighbors, even sharing the fruits of the Indians' larder on the first Thanksgiving. As we grew older, we learned that these same settlers deliberately tried to infect their neighbors with smallpox-tainted blankets,[3] used legal and illegal methods to remove Indians from their homelands,[4] and often condoned the massacre of women and children in the name of Manifest Destiny.[5]

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3. *See* DONALD R. HOPKINS, PRINCES AND PEASANTS: SMALLPOX IN HISTORY 246 (1983). Some European settlers tried to intentionally contaminate the Indians so as to reduce their numbers, even though most smallpox transmissions to Indians were inadvertent. *See* id. Hopkins describes one such incident:

> Probably the most notorious instance of smallpox being deliberately recommended as a weapon against North American Indians occurred when Sir Jeffrey Amherst, commander-in-chief of British forces in North America, became concerned about a coalition of Indian tribes led by the Ottawa chief Pontiac that was harassing the western frontiers of Pennsylvania, Maryland and Virginia . . . Amherst suggested in a letter written to Colonel Henry Bouquet in 1763, 'Could it not be contrived to send smallpox among these disaffected tribes of Indians? We must on this occasion use every stratagem in our power to reduce them.' That July, Bouquet replied: 'I will try to inoculate the Indians with some blankets that may fall in their hands, and take care not to get the disease myself.' *Id.* The result of the conspiracy is unknown. *See id.*

4. *See* Theda Perdue, *The Trail of Tears: Removal of the Southern Indians, in* THE AMERICAN INDIAN EXPERIENCE: A PROFILE: 1524 TO THE PRESENT 108-10 (Philip Weeks ed., 1988). The State of Georgia sought to remove the Cherokee from their lands within the state in order to free up acreage for cotton production. *See id.* at 108-09. This end was accomplished through the passage of laws, which made continued residence within the state intolerable. *See id.* These laws prohibited the Cherokee from mining gold on their land; prohibited Cherokee from testifying against Whites in court; enjoined the Cherokee council from meeting; and prohibited Cherokee leaders from speaking publicly against removal. *See id.* at 109. Around the same time, Congress responded to the demands of southern states that more Indian land be freed up for agricultural exploitation by passing the Indian Removal Act in 1830. *See id.* at 108-09. Drafted with the intent of encouraging Indians to move westward, The Indian Removal Act authorized the president to negotiate exchanges of territory with the Indians and appropriated $500,000 for that purpose. *See id.* at 109. In 1832, the U.S. Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) enjoined Georgia from enforcing state law upon Cherokee land. *See id.* at 111. Georgia responded by simply ignoring the decision, and President Andrew Jackson chose not to enforce it). *See id.* at 111.

5. *See* ROBERT M. UTLEY, CAVALIER IN BUCKSKIN: GEORGE ARMSTRONG CUSTER AND THE WESTERN MILITARY FRONTIER 60-77 (1998). In fact, 'complete annihilation' was seen as an acceptable means of depopulating the West of native peoples. *See id.* By 1868, public sentiment regarding the Indians had split into two factions: the Easterners tended to favor policies of conciliation, kindness and tolerance towards the Indians (who would then be more submissive), while most Westerners felt that a military solution was the only way to effectively address the issue. *See id.* Either way, the goal of both groups was the same:

Over time, the federal government shifted from a policy of annihilation to one of containment and assimilation.[6] This removed many native peoples from their indigenous lands, and placed them in reservations where their populations could be controlled and they could be taught the ways of a more civilized, genteel society.[7] The result of this was a loss of many Indian traditions and abject poverty on the reservations, much of which continues today.[8] Again, the federal government has switched gears on its Indian policy. Realizing that poverty is one of the most pressing issues facing Indian tribes today, the federal government has adopted a general

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to clear the plains between the Platte and Arkansas Rivers of all Indians and relocate them to areas outside the region. *See id.* Generals Philip H. Sheridan and George Armstrong Custer were both Civil War veterans and well-versed in the art of "total war," in which civilian populations would be subjected to the horrors of war so as to destroy the enemy's ability and will to fight. *See id.* at 60. Now they planned the same treatment for the Indians – search them out in their winter camps, kill or drive them from their lodges; destroy their ponies, food and shelter; and hound them mercilessly across a frigid landscape until they gave up. *See id.* If women and children fell victim to such methods, it was regrettable, but justified because it resolved the issue quickly and decisively and thus more humanely. *See id.* Robert M. Utley describes the effect of this policy on Indian women and children with an examination of the Battle of Washita in 1868, which established General Custer's reputation as the nation's preeminent Indian fighter, "The Washita typified a reality of Indian warfare that all frontier commanders had to face . . . Total war subjected women, children and old people to death or cruel suffering. Surprise attack on an Indian village, centerpiece of the strategy of total war, inevitably struck down noncombatants. Women and children were killed at the Washita, rarely deliberately, except by the Indian scouts, but accidentally in the tumult of combat and in self defense. The destruction of property, food and transportation, followed by weeks of fearful flight to avoid the soldiers, forced women and children to endure terrible hardship. Most officers, including Custer, lamented such measures but believed them a necessary evil." *Id.* at 77.

6. *See* Donald J. Berthrong, *The Bitter Years: Western Indian Reservation Life, in* THE AMERICAN INDIAN EXPERIENCE: A PROFILE: 1524 TO THE PRESENT 156 (Philip Weeks ed., 1988).

7. *See id.* In 1877, Indian Commissioner E. A. Hayt stated that there was "little hope of the civilization of the older, wild Indian, and the only question is how to control or govern him, so that his savage instincts shall be kept from violent outbreaks." *Id.* Government officials saw focusing "governmental programs on 'partially civilized' adult Indians, and especially on children" more feasible. *Id.* In time the Indian youth would abandon the "barbarism, idolatry and savage life." *Id.*

8. *See* Bill Richardson, *The Need to Empower Indian Tribes*, USA TODAY (Magazine), Nov. 1, 1994 at 54. Indian reservations illustrate some of the most severe examples of poverty in the United States. *See id.* The Bureau of Indian Affairs denotes that approximately 93,000 Native Americans are homeless or underhoused. *See id.* Twenty percent of Indian homes lack toilets, and half do not have telephones. *See id.* Of 1,800,000 Native Americans, 603,000 live below the poverty line, including 85,000 under the age of five. *See id.* Indian youth have the highest school dropout rate of any minority group at 35.5%. *See id.* Unemployment on reservations always has exceeded 50% nationally and is over 80% on some reservations. *See id.*

policy of self-sufficiency.[9] The tribes can only emerge from this current morass through economic development of their reservations. Gaming[10] has emerged as one of the most visible and controversial means of accomplishing this goal.[11]

In 1988, Congress opened the gaming doors to Indian reservations with the passage of the Indian Gaming Regulatory Act (hereinafter "IGRA").[12] IGRA came about after more than a decade of fighting between tribes and the states over the ability of states to constrain on-reservation economic enterprises.[13] IGRA provides a federal sanction to tribes that allows them to conduct gaming enterprises on their reservations in order to improve their general welfare.[14] It also places limitations on the use of revenue generated by these operations.[15] Through IGRA, the Indian tribes acquired a federally-created means of generating revenue through gaming enterprises. This increased revenue has created a great incentive to be a recognized tribal member. Being a recognized member of a tribe involved in gaming entitles that member to some very tangible benefits, one of which is a portion of the revenues generated by gaming enterprises.[16] As a result of IGRA, many tribes today generate enormous sums of revenue.[17]

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9. *See* U.S. Department of the Interior, Bureau of Indian Affairs, *Mission Statement, at* http://www.doi.gov/bia/mission.html (last visited Oct. 4, 2000). The Bureau of Indian Affairs seeks to "enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives." *Id.* Furthermore, the agency's mission is to accomplish these things by delivering quality services that maintain "government-to-government relationships within the spirit of Indian self-determination." *Id.*

10. Gaming is defined as playing at "any game for money or property; in short to stake money or property on a chance." BALLENTINE'S LAW DICTIONARY 513 (3d ed. 1969).

11. *See* Dennis McAuliffe, Jr., *Casinos Deal Indians A Winning Hand; Billions in Revenue Ease Tribes' Dependence on Federal Funds*, WASH. POST, Mar. 5, 1996, at A1. Congress has specifically limited tribal spending resulting from operating gaming enterprises; namely, the "social, welfare and economic-assistance programs historically regarded as Washington's responsibility to Indians under treaties and the ensuing federal trust relationship with the tribes." *Id.* After these essential needs are met, the tribe is free to divide the profits among its members. *See id.*

12. 25 U.S.C.A. § 2701 (West Supp. 2000).

13. *See* Eric Henderson, *Ancestry and Casino Dollars in the Formation of Tribal Identity*, 4 RACE & ETHNIC ANC. L. J. 7, 10 (1998).

14. *See* 25 U.S.C.A. § 2702 (West Supp. 2000).

15. *See id* § 2710 (b)(2)(B).

16. *See id.* § 2710 (b)(3). This section allows for per capita payments of net revenues of class II gaming to individual members of the tribe with several restrictions on those payments. *See id.*

17. See David Pace, *Casinos Bring Money, Hope to Indians*, BOSTON GLOBE, Sept. 3, 2000, at A10. Gambling money has increased from $100 million in 1988 to $8.6 billion. *See*

The tribes have managed to bring gaming onto their reservations through the historical respect for tribal sovereignty. Since the inception of the notion of tribal sovereignty, the federal government has generally refrained from passing laws that invade the sovereign power of the tribe on matters of internal importance.[18] The U.S. Supreme Court has likewise refused to interfere in the internal decision-making process of tribes. That trend is illustrated in *Santa Clara Pueblo v. Martinez*[19] where the Court affirmed the historical view of tribal governments as "distinct, independent political communities, retaining their original natural rights in matters of local government."[20]

Accompanying this notion of respect for tribal sovereignty is the need to protect the individual tribal member from the excesses of the tribal government. The federal government recognized this need by creating the Indian Civil Rights Act of 1968 (hereinafter "ICRA").[21] Unlike the Bill of Rights of the U.S. Constitution, which limits the power of the federal government for the benefit of citizens, ICRA serves two purposes: it defines the boundaries of tribal actions regarding the rights of individuals,[22] while simultaneously promoting the well established policy of furthering Indian self-government.[23]

Although the passage of ICRA has produced a deluge of cash into Indian reservations,[24] it, coupled with the historic goals of tribal autonomy and sovereignty over tribal matters, has created the potential for massive

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id. Tribes like the Mille Lacs Band and the Gila River are two of twenty-three tribes across the country owning casinos that grossed more than $100 million in 1988. *See id.* Those twenty-three together accounted for fifty-six percent of total Indian gaming revenues that year. *See id.*

18. U.S. Department of the Interior, Bureau of Indian Affairs: *The Basis for the Government-to-Government Relationship Between the United States and Tribal Nations,* (last visited July 4, 2000), *at* http://www.doi.gov/bia/govtogov.html. In order to enter into treaties with Indian tribes, there had to be an acceptance of several concepts: first, the tribes were to be considered a sovereign nation; second, the tribes were responsible for their internal affairs; and third, any relations with the tribes were to be handled by the central government and considered as between two nations. *See id.* However, by 1832, tribal sovereignty had been limited as a result of an agreement by the tribes to regard themselves as being under the protection of the United States. *See id.* Also, tribes agreed to forego their external sovereignty and acknowledge legislative Powers of Congress over them. *See id.*

19. 436 U.S. 49 (1978).

20. *Id.* at 55 (citing to Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

21. *See* 25 U.S.C.A. ch. 15 (West Supp. 2000).

22. *See id.* § 1302.

23. *See* Morton v. Mancari, 417 U.S. 535, 551 (1974). *See also* Ramos v. Pyramid Tribal Ct., 621 F. Supp. 967, 970 (D. Nev. 1985) (stating that the Court must construe terms in the Indian Civil Rights Act "with due regard for historical, governmental and cultural values of an Indian tribe").

24. *See* Pace, *supra* note 17. The explosion of gambling money, from $100 million in 1988 to $8.6 billion in 1998 triggered a debate in Indian country over whether casino profits

abuses of the rights of individual tribal members. The events that occurred in Texas on the Tigua Indian Reservation in the Fall of 1997 and Spring 1998 illustrate this danger.

This comment examines the problems that can erupt when an Indian tribe is left unaccountable for actions directed toward individual tribal members. It also proposes a solution that attempts to both protect the rights of individual Indians, and preserve the indigenous tribal law and culture that the policies of autonomy and tribal sovereignty seek to promote.

II. THE TIGUAS

Like many of those who reside in the El Paso area, the Tigua are, in a greater historical sense, immigrants. Their origins as indigenous people lie not in the rust-colored crags of the Franklin Mountains, but about 270 miles to the north. Indeed, they are in Texas because they found themselves, either by choice or by conscription, on the losing side of a war.

The Tigua are a tribe of the Pueblo (a tribe believed descended from the Anasazi, a now extinct people known for their spectacular mud-and-stone cliff dwellings dotting the American Southwest).[25] The Anasazi flourished in Northern New Mexico and the Four Corners region circa 1 A.D., after which they mysteriously vanished.[26] While many myths and legends exist to explain what happened to the Anasazi, it is widely believed that a combination of war, failed harvests and climactic change forced them out of their canyon strongholds and into the flatlands, where some groups became the Pueblo.[27]

The Tigua Pueblo's first encounter with Europeans came in 1540 A.D., when Spanish explorer Fransisco Vasquez de Coronado came upon them in northern New Mexico while searching for the Seven Cities of Cibola.[28]

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should be returned directly to tribal members or reinvested in the community for such items as schools, housing and public works. *See id.*

25. *See* Colloff, *supra* note 1, 115.

26. *See Why Anasazi?*, Montezuma County Economic Development Council, *at* http://www.swcolo.org/Tourism/ArcheologyHome.html (last visited Oct. 14, 1999); *Anasazi Archaeology,* Montezuma County Economic Development Council *at* http://www.swcolo.org/Tourism/ArcheologyHome.html (last visited Oct. 14, 1999).

27. *See* John Kantner, *Sipapu – Frequently Asked Questions*, at http://www.sipapu.gsu.edu/html/faq.html (last visited Oct. 17, 1999) (describing the origins of the Pueblo people).

28. *See* BILL WRIGHT, THE TIGUAS: PUEBLO INDIANS OF TEXAS 5 (1993). It was the myth of the Seven Cities of Cibola that drove early Spanish exploration into North America. *See also* Addison Ervin Sheldon, *History and Stories of Nebraska History: The Story of Coronado at* http://www.ukans.edu/~kansite/hun/books/nbstory/story1.html (last visited Oct. 4, 2000). The Spanish conquistador Fransisco Vasquez Coronado first heard tales of the existence of the seven cities somewhere to the north of Mexico, "with houses built of stone many stories high, and great abundance of gold and silver, turquoises, cloth,

Like other Pueblo Indians, the Tigua lived in adobe dwellings and had an agricultural-based economy.[29] The tribe's situation changed drastically in 1598, when Spanish explorer Don Juan de Oñate forcibly tried to convert them to Catholicism and to subject them to Spanish rule.[30] Many of the Pueblo tribes revolted, and in 1680, they drove the Spanish out of northern New Mexico.[31] As the Spanish fled southward along the Rio Grande, they were accompanied by about 317 Tiguas.[32] Whether these Tiguas followed the Spanish voluntarily or were taken against their will is unclear.[33] The Spanish and Tigua eventually settled in Ysleta del Sur, which is now present-day El Paso County, Texas.[34] The Spanish immediately began

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sheep, cows and tame partridges," from a Spanish monk, who had traveled extensively through North America. *Id.* Coronado quickly assembled an army of three hundred Spaniards and a thousand Indians, and headed north from Mexico to find these cities in 1540. *See id.* Coronado wandered across present present-day Arizona, New Mexico, Kansas and Nebraska before conceding that there were no Seven Cities, and returned unsuccessfully to Mexico in 1541. *See id.*

29. *See* WRIGHT, *supra* note 28 (stating that "additional reports concerning the Tiguas said they 'ate corn, beans and melons, used skins of animals for clothes and made long robes of feathers and cotton'").

30. *See id.* at 8. "In 1598, the Indians of New Mexico encountered the expedition that would change their lives forever, for the viceroy of Mexico had given Don Juan de Oñate permission to colonize the northern boundaries of the empire, now the states of Texas and New Mexico." *Id.* On 30 April [1598] near El Paso, Governor Oñate pronounced his possession of all of New Mexico and Texas for the Spanish King. . . [Oñate's group was] well received by the Indians they encountered. *See id.* The padres communicated the Catholic faith to the natives as they traveled, and Oñate established Spanish rule over the people. *See id.*

31. *See id.* at 10. The Christianized Pueblo population, under control of the Spanish, numbered about 35,000. *See id.* In contrast, the population of Spaniards and Franciscian priests numbered around 2,832. *See id.* The attack, on August 15, 1680, was launched by the Indians to rid themselves of the forced labor and religious persecution that the Spanish had made a part of the colonization process. *See id.*

32. *See id.*

33. *Compare Tigua Indians, at* http://www.cs.utep.edu/elpaso/tiguas.html (last visited August 28, 2000) (stating that "[n]obody knows for sure if the first group of Tiguas who came to the area willingly or not but members of the second group of Tiguas were brought as prisoners and slaves [sic]. For fifty or sixty years there were numerous rebellions of Tiguas trying to leave the El Paso area. . ..") *with* WRIGHT, *supra* note 28, at 10 (stating that "[u]pon finding the Isleta pueblo abandoned, the northern group [of retreating Spaniards] continued south where they joined the others [Spaniards from a separate group, who began retreating from the area upon hearing of the northern group's defeat], along with 317 *friendly Tiguas* from Isleta, and continuing on, established a temporary settlement in the area of present El Paso") (emphasis added).

34. *See* WRIGHT, *supra* note 28, at 10. Due to the failure of an attempt in 1681 to reclaim the Indian pueblos lost to the Indians in 1680, the Spanish returned to El Paso, where Spanish Governor Otermin decreed that the settlement at El Paso del Norte would henceforth be permanent. *See id.*

building a mission church for the Tiguas.[35] The Tiguas, in turn, went to work cultivating the land.[36]

Although King Charles V of Spain granted the Tiguas title to a 36 square mile parcel of land,[37] the tribe lost most of their land resources. The decline in the tribe's resources is largely due to state-sanctioned land seizures by White homesteaders,[38] the Salt Wars of 1877,[39] attacks by rival Indian tribes,[40] and more recently, intermarriage with the local Hispanic population.[41] By the 1960's the tribe was nearly extinct.

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35. *See id.* at 11. "Between 1681 and 1691 the Spanish erected the original Ysleta mission to serve the Tigua Indian population. . . a devastating flood swept much of the mission structure away in 1740, but it was rebuilt between 1740 and 1744. The present mission stands on the original foundation and incorporates some of the original wall." *Id.*

36. *See id.* at 13. The Tiguas applied themselves to the cultivation of the land under the protection of the Spanish and continued to serve the padres in various capacities. *See id.* In a letter from 1754, Fray Manuel San Juan Nepomuceno y Trigro, describes the cultivation practices: "The Indians. . . have their gardens adorned with beautiful grape vines, peach trees, apple trees, and good vegetables and the garden of the convent imitates them in providing delight to the eyes and satisfaction to the taste. All the cultivation is due to the annual presence of a gardener, provided by the sons [of the mission], who come to the convent every week with the boys needed for the daily cleansing of the cells; they also provide the other workers—a bell ringer, porter, cook, two sacristans, and the Indian women needed to grind the wheat". *Id.*

37. *See* Colloff, *supra* note 1, at 115.

38. *See* WRIGHT, *supra* note 28, at 16. Wright describes a scheme in which Anglo land speculators attempted to drive the Tigua off their land by speaking to the Texas Legislature to incorporate a 36 square-mile area which included land deeded to the Tigua by the Spanish. *See id.* Under the terms of incorporation, the new municipality had the power to deed tracts to non-Indians without compensating the tribe and impose astronomical taxes on Indian-held lands so as to force the Indians into default, thus giving the municipality an excuse to confiscate the land. *See id.* Though the incorporation was declared illegal in 1874, "land transactions that occurred during the interim period were not revoked, and the Indians were effectively removed from possession of their grant and aboriginal holdings." *Id.*

39. *See id.* Wright notes that prior to 1877, the Tiguas relied on vast dry lakes at the foot of the Guadalupe Mountains in west Texas to supply them with salt necessary for food preservation, seasoning and trade. *See id.* In 1877, a local Anglo judge, a corrupt Catholic priest and others attempted to gain control of the salt flats and to deny the Indians access to them. *See id.* War between the Indians and the salt speculators broke out, and the Indians were ultimately cut off from access to the salt flats. *See id.*

40. *See id.*

41. *See id.* at 27. Since their first encounter with the Spanish, the Tiguas have surmounted many obstacles to survive as a tribe. Other Pueblo groups were absorbed into the local population and disappeared as distinct cultures, but the Tiguas have remained; they have held fast to their cultural identity even though they have lost most of their language and intermarried with other Indians and Hispanics. *See id.* Now intermarriage poses a formidable problem. Under the federal government's terms of trusteeship, persons must have a "blood quantum" of at least one-eighth Tigua ancestry to be carried on the tribal rolls. *See id.* Because the tribe is so small, it is virtually impossible to marry within the tribe without marrying a cousin. *See id.* Most of the young people reject this option and

Anthropological linguist Jerry Gathings studied the tribe and noted that he was witnessing "the final days of a moribund culture. . . Only a few people identified themselves as [Tigua] Indians, and virtually no one knew the language."[42]

The situation of the Tiguas began to change for the better when the State of Texas formally recognized the tribe under the Texas Commission for Indian Affairs in 1967.[43] One year later, the Tigua Indians received Federal recognition as a tribe.[44] This recognition marked the transformation of what had once been an impoverished backwater of El Paso County into a sovereign nation. Today the tribe is composed of approximately 1500 members residing on forty-seven acres in the Lower Valley area of southeast El Paso.[45]

III. THE CURRENT CRISIS[46]

The story begins in 1993, a few years after IGRA provided a statutory basis for gaming on Indian reservations as a way to promote economic development, self-sufficiency, and strong government for the tribe.[47] That year, the tribe tried to negotiate with Texas Governor Ann Richards for gaming on the reservation, but their efforts were unsuccessful.[48] Despite a lack of state approval, the tribe erected a bingo hall (the Speaking

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marry outside the tribe, ensuring that sooner or later the general blood quantum will be diluted below the statutory limit. *See id.*

42. Colloff, *supra* note 1, at 116.

43. *See* WRIGHT, *supra* note 28, at 24.

44. *See* An Act Relating to the Tiwa Indians of Texas, Pub. L. No. 90-287, 82 Stat. 93 (1968) (codified as amended in scattered sections of 25 U.S.C.).

45. *See* Colloff, *supra* note 1, at 115-16, 128; *see also* Bryan Wooley, *Bloodline: If We Could Bottle Our Indianness and Sell It, We Would Be Rich, Says a Leader of El Paso's Tigua Tribe. Of Course They Can't – But Casino Gambling Could Be the Next Best Thing*, DALLAS MORNING NEWS, July 3, 1994, at 6. The remnants of the Tigua tribal lands are now only a tiny reservation and the approximately 1500 people on the tribal membership roll strive to preserve their tradition and culture. *Id.*

46. While I have strived to obtain support for the facts in this section from independent primary sources, I must attribute the factual flow (and primary inspiration for this comment) to the article by Pamela Colloff, *The Blood of the Tigua*, TEX. MONTHLY, Aug. 1999, at 112.

47. *See* 25 U.S.C.A. § 2702 (1) (West Supp. 2000).

48. *See* State Briefs, *Indians Plan to File Suit*, HOUS. CHRON., Apr. 3, 1993, at A30. The suit alleged that the state failed to negotiate with the tribe in good faith regarding the opening of a casino on the Tigua reservation. *See id.* Then-Governor Ann Richards replied that "she does not believe the law allows her to authorize any gambling beyond what is already available." *Id.*

Rock Casino) and added poker, blackjack, and pull-tab gaming.[49] Today, the casino generates enormous sums of money for the tribe, with reported gross annual revenues of approximately $60 million.[50] Casino profits fund the salaries of tribal leaders, subsidize reservation housing, provide free health care and college tuition, and give each registered member of the tribe a yearly stipend that, in 1998, amounted to $15,000.[51] The casino and its profits have become, according to tribal governor Vince Muñoz, "the new buffalo."[52]

The Tigua conflict had innocent, even celebratory, origins in 1990, when Marty Silvas, at age 27, became the youngest person ever named war captain and safekeeper of the *juanchido*, one of the tribe's most sacred relics.[53] In 1993, Manny Silvas, Marty's brother, and the tribe's lieutenant governor, fell under the tribal council's suspicion for allegedly misappropriating $70,000 of tribal funds.[54] As a result of this suspicion, the tribal council discussed prohibiting Manny from running for re-election.[55] Chief Enrique Paiz supported Manny and argued that the charges were groundless. Nevertheless, the council voted to prohibit Manny from running for re-election.[56] In response to Paiz's show of support for Manny, the council stripped Paiz of his office, an act never before committed, much less contemplated, since the chief was purportedly the ultimate authority.[57] In reaction to the tribal council's actions toward his

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49. *See* Colloff, *supra* note 1, at 128 (describing the tribe's actions, which brought various forms of gaming to the tribe, despite the lack of approval by Texas Governor Ann Richards).

50. *See Ruling Frees Tribe to Evict Members Deemed Less Than One-Eighth Indian – Judge Withdraws Order Stemming Lawsuit by About 20 Families,* DALLAS MORNING NEWS, Dec. 16, 1998, at 25A.

51. *See* Colloff, *supra* note 1, at 128.

52. *See id.* The term "the new buffalo" is a metaphor Tigua Governor Muñoz uses which analogizes casino gaming profits with buffalo herds from earlier days. *See also* Laura Laughlin, *Casinos Called "New Buffalo for the Indians: Arizona Tribes Reaping Benefits; Others Warn of Gambling's Pitfalls*, DALLAS MORNING NEWS, May 29, 1994, at 45A. *See also* Wooley, *supra* note 45 (quoting Marty Silvas as saying "The gambling is our white buffalo. . . In the old days, the buffalo was the Indians' housing, it was our clothing, it was our food, everything we needed. We need something to hold the future. We need something to take care of our children"). While Silvas' wording is different from Munoz', the buffalo metaphor and the message it conveys is the same: gambling has emerged as the Indian tribes' new means of sustenance.

53. *See* Colloff, *supra* note 1, at 130-31. The juanchido is a drum that the Tiguas believe is used by the tribe's ancestors to communicate to the current generation, and it is often consulted on important matters and issues facing the Tribe. *See id.*

54. *See id.*

55. *See id.* at 131.

56. *See id.*

57. *See id.* Today, the position of Tigua chief is largely ceremonial. *See id.* While the chief is the tribe's spiritual guide and has absolute authority over tribal matters until his

brother and Chief Paiz, Marty demanded that the tribal council step down, and he hid the juanchido and other sacred objects.[58]

The tribal council attempted to recover the objects by filing suit against Marty in federal court, and later offering a $50,000 reward for return of the items.[59] The case, however, was dismissed for lack of jurisdiction, since the tribe was considered its own nation.[60] The council's inability to recover the items, compounded by Marty's refusal to participate in a tribe-sanctioned ceremony, lead the council to remove him from the tribal rolls and send armed tribal police to remove him from the reservation in May of 1996.[61] According to Marty, the officers demanded at gunpoint that he reveal where he had hidden the items.[62] When he refused, he was driven by car to the edge of the reservation and told that he was "no longer a part of these people. . . [he did not] belong here anymore."[63]

The tribe's wealth and the Governor's (Munoz) power had grown considerably by 1996; in November, the casino added slot machines, and Munoz was named gaming commissioner.[64] It was at this point that the conflict began to extend beyond the immediate clash between Marty Silvas and the tribal council. Many families in the tribe begin to take sides and those who sided with Marty feared retaliation.[65] The tribal leaders confirmed the families' fears when they announced they would re-examine the tribal rolls in order to correct disparities created by the inclusion (in tribal membership) of those who did not meet blood-line requirements. Those who lacked the minimum blood requirements were to be removed from tribal rolls.[66]

It is important to note that the requisite amount of blood necessary to be considered Indian is one-eighth, a number set by Congress almost a decade ago.[67] The Tigua is one tribe that did not determine its blood

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death, that power is rarely, if ever, invoked. *See id.* Instead, the tribal governor is the one responsible for managing the casino and, consequently, the tribe's economic fortune and power. *See id.*

58. *See id. See also* Laura Smitherman, *Tiguas Get Back Long-Missing Sacred Drum, Artifacts*, EL PASO TIMES, Mar. 16, 1999, at 1A (referring to some of the other missing artifacts, including several religious masks known as *Los Abuelos*).

59. *See Texas Tribe's Dispute Ties Aritifacts Up*, DALLAS MORNING NEWS, Dec. 14, 1996, at 39A.

60. *See id.*

61. *See* Colloff, *supra* note 1, at 131.

62. *See id.*

63. *Id.*

64. *See id.* at 128.

65. *See id.* at 131.

66. *See Tiguas Cut From Tribe Face Hardship - Federal Benefits, Housing at Risk As Leaders Try to Enforce Ancestry Rules*, DALLAS MORNING NEWS, June 16, 1998, at 17A.

67. *See* Nedra Pickler, *Tribal Membership - Harder to Win with Casino Riches the Prize*, CHI. TRIB., Aug. 31, 1999, at C2. Most tribal constitutions require a certain blood

quantum, but had it dictated to it by the federal government.[68] Even more importantly, in February 1997, the tribal council discussed plans to resurrect an unsuccessful attempt to *reduce* the blood quantum from one-eighth to one-sixteenth in order to boost the tribe's population and prevent it from dying out.[69]

The story of Grace Vela involves the issue of blood quantum and is an extreme example of tendentious tribal authority exerted over Vela and other individual tribal members for siding with Marty Silvas.[70] Vela's brother was Marty's friend, and her family had opposed the tribal council in past elections.[71] Although Vela had been listed as Tiguan on tribal rolls for more than twenty years, her lineage was suddenly an issue for tribal leaders.[72] Pamela Colloff, author of the Texas Monthly article, "Blood of the Tigua," states that Vela was an unlikely candidate for blood-quantum re-evaluation:

> [S]he had lived on the reservation for eighteen years and had worked there since 1977, directing many of the tribe's social service programs. Her mother, 68-year-old Natalia Lopez, was the godchild of the revered Tigua chief Mariano Colmenero and had grown up in a small adobe house shaded by pomegranate trees in a part of east El Paso that later became reservation land. Vela was included in the tribal rolls when they were first compiled in 1967; twenty years later, when the Tigua received federal recognition, she was again listed in the tribal rolls – a register that the Texas Indian Commission had spent seven years researching and described as 'the most thorough, exhaustive, and complete determination of who is and who can legitimately be considered a Tigua.'[73]

Despite the weight of this evidence, the tribal council's census department notified Vela, her mother, and other family members that they

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quantum – or proportion of Indian lineage – for membership. *See id. See also* Suzie Siegel, *Reclaiming a Lost Legacy; American Indian Heritage Month Highlights the Search Many Women and Men Are Conducting to Reclaim their Ancestral Ties and Culture*, The Tampa Trib., Nov. 14, 1994, Baylife at 1. Siegel summarizes Scott L. Peeler, a researcher of Indian genealogy: "Tribes set membership requirements. Being listed as Indian on a census or birth certificate is not enough. [The tribes] want proof that you are a direct descendent of someone on their membership rolls. . . . Most also stipulate a 'blood quantum.' The majority [of tribes] require that your ancestry be at least a quarter tribal. . . ." *Id.*

68. *See Tiguas Cut From Tribe Face Hardship*, *supra* note 66.

69. *See Tigua Leaders May Revive Attempt to Reduce Native-Blood Requirement*, DALLAS MORNING NEWS, Feb. 17, 1997, at 19A.

70. *See* Colloff, *supra* note 1, at 132.

71. *See id.* at 131.

72. *See id.*

73. *Id.*

lacked sufficient Tigua blood, and thus were no longer members of the tribe.[74] Vela appealed the decision by referring to an 1873 Tigua land survey entitled 'We the Indians,' that was signed by her great-great-grandfather and an 1895 tribal compact signed by her great-great-grandmother's brother.[75] The tribal census department rejected her appeal, claiming that the documents were suspect because they did not establish the blood quantums of Vela's ancestors, much less their "Indianness."[76]

The conflict between Marty Silvas and the tribal council became more acrimonious in April 1998, when he was indicted for felony theft of the juanchido and other sacred objects.[77] He was tried in state court and acquitted on November 5, after the jury accepted the defense's argument that Marty, "in his lifetime position as the war captain, was the drum's rightful owner and could not have stolen [the items]."[78] Vela's younger brother had prepared to testify on Marty's behalf as a character witness, and Vela's sister sat in on the trial in an additional show of support for Marty.[79]

The day after the jury acquitted Marty Silvas, Vela and several of Marty's supporters were fired from their reservation jobs.[80] Four days later, they were officially banished from the tribe for lacking the requisite amount of Tigua blood and were told they had thirty days to leave the reservation.[81] While some of the banished families accepted small monetary settlements from the tribe and left the reservation voluntarily, Vela and seven other families decided to stay.[82] The courts would be of no help. In December 1998, the banished families filed suit in state district court to prevent the tribe from removing them from the reservation. Nevertheless, the suit, based on civil rights violations, was dismissed.[83]

In the wake of the ruling, the tribe was free to remove the banished families who remained on the reservation and began to do so by essentially "laying siege" to their homes.[84] Colloff describes the actions of the Tigua police in her article:

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74. *See id.*

75. *See id.*

76. *See id.* at 131-32

77. *See Former Texas Tribal Official Indicted-Man Charged With Theft of Tigua Indian Artifacts*, DALLAS MORNING NEWS, April 9, 1998, at 16A.

78. Colloff, *supra* note 1, at 132.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See Ruling Frees Tribe, supra* note 50.

84. *See* Colloff, *supra* note 1, at 132.

> Tribal police officers erected chain-link fences around the reservation's housing complex in late December, blockading streets and posting officers at its entrance; any banished tribe members trying to enter were turned back, and those who ventured out to take their children to school or to head to work were forced to scale the chain-link fences under cover of darkness to get back inside. [Grace] Vela kept her blinds drawn and her lights out, subsisting on food that her sister threw over the barricades.[85]

The tribal police increased the pressure after Christmas. By January 1999 they began shining floodlights into Grace Vela's windows, and by February, her water had been turned off.[86] On February 18, tribal police officers armed with shotguns and revolvers knocked down Vela's door, handcuffed her, and escorted her off the reservation.[87]

Tribal Governor Munoz insisted that the tribe's actions in re-examining the membership rolls were not to consolidate power or achieve financial gain, but were carried out under pressure from the Bureau of Indian Affairs.[88] Allegedly, the Bureau had threatened to reduce the tribe's federal funding unless the membership rolls were reexamined.[89] In the interest of fairness and balance, I contacted Tom Diamond, attorney and spokesman for the Tigua tribe, by phone on February 25, 2000, and asked him for any comment he or the tribe might have about this issue. Mr. Diamond replied curtly that the episode was an internal tribal matter and that he had no comment.

IV. TRIBAL SOVEREIGNTY

It is important to note that there has been no proof that the tribal council's actions violated its own constitution or the provisions of ICRA. As a result, there is no basis for the federal government to question the tribal action taken in Vela's case because the current understanding of tribal sovereignty prevents federal examination of internal tribal matters. A federal court did, however, dismiss the tribe's suit against Marty Silvas for theft of the sacred items on the grounds that the tribe constituted a sovereign nation.[90] Furthermore, the Bureau of Indian Affairs refused to comment on the issue in the Colloff article, claiming that it was "an inter-

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85. *Id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See Texas Tribe's Dispute, supra* note 59.

nal tribal matter."[91] Tribes are, to a large extent, accountable to no one but themselves in their decisions on matters affecting the tribe.[92]

It is difficult for many Americans to understand the power of American Indian tribal sovereignty because many of us are steeped in American notions of the definition of democracy. According to Robert N. Clinton, "American law tends to analyze government legitimacy and the relationship between domestic sovereign units in light of a popular sovereignty, federalist theory developed from jurisprudential roots."[93] In other words, we think of governmental power as emanating from the people to the sovereign, and it is by the people's consent that the sovereign rules.

This theory encompasses two important notions. First, federalist theory and the notion of natural law (derived in great part from the work of John Locke),[94] generally viewed consent of the governed through the constitutional social contract as the fountainhead of governmental legitimacy.[95] In essence, governmental legitimacy derives from the consent of the people to be governed. Second, natural law recognizes that sovereignty is best exercised when it is divided, rather than held solely by one person or one body.[96] Phrased differently, rather than have the entire power of the state rest in the hands of a monarch or an autocrat, American-style democracy divides power among a number of bodies, namely, the federal government and the states. This division is not absolute. American legal theory also recognizes the benefits of having an ultimate authority vested with the power to resolve legal conflicts and to enforce decisions among competing sovereigns within the federal union.[97]

Indian tribes lie outside this *matryoshka*[98] framework of sovereigns within sovereigns. The Indian tribes existed as independent nations

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91. Colloff, *supra* note 1, at 132.

92. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (stressing that Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government); United States v. Kagma, 118 U.S. 375 (1886) (stating that the Indian people are a separate people with the power of regulating their internal and social relations); Roff v. Burney, 168 U.S. 218, 18 (1897) (holding that the Indian tribes "have the power to make their own substantive law in internal matters").

93. Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 843 (1990) (referring to G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776 - 1787, at 453–63, 532-43, 546-47 (1969)).

94. *See id.* at 844; *see also* J. LOCKE, OF CIVIL GOVERNMENT, SECOND TREATISE (Gateway ed., 1955).

95. *See* Clinton, *supra* note 93, at 844 (citing to THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (J. Cooke ed., 1961)).

96. *See id.*

97. *See id.* at 845.

98. *See* RICHARD L. LEED & SLAVO PAPERNO, 5000 RUSSIAN WORDS WITH ALL THEIR INFLECTED FORMS AND OTHER GRAMMATICAL INFORMATION. A RUSSIAN DICTIONARY WITH AN ENGLISH-RUSSIAN WORD INDEX AND AN APPENDIX ON RUSSIAN END-

before the creation of the federal union, and their annexation by the U.S. government was involuntary.[99] Nor did the rulers of Indian tribes look to European philosophers or Western notions of democracy to justify the legitimacy of their power; they relied instead on complex systems based on kinship, religion, or homegrown notions of government, each one unique to an individual tribe.[100]

One of the first cases to address the extent of tribal sovereignty was *Cherokee Nation v. Georgia*,[101] a case involving "a motion on behalf of the Cherokee Indians. . . to restrain the state of Georgia. . . from executing and enforcing the laws of Georgia. . . within the Cherokee nation."[102] The Cherokee had filed suit against Georgia after the state passed laws confiscating lands within the state boundaries that were given to the tribe by the federal government.[103] The question of whether the state of Georgia could assert its authority over the Cherokee would be determined largely by whether the Supreme Court believed that the tribe constituted "a foreign state in the sense in which that term is used in the constitution."[104]

One of the first hurdles any court must clear before hearing a case is whether or not it has jurisdiction over the matter. Chief Justice Marshall approached this issue by dividing the question into two distinct issues: whether the nation was "a foreign state in the sense in which the term is

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INGS 101 (1986). A *matryoshka*, or Russian nesting doll, is a small wooden doll that has been cut in half widthwise and hollowed out. In the hollow fits a slightly smaller doll, which is in turn cut in half widthwise and hollowed out to fit another slightly smaller doll, and so on and so on and so on until two or more dolls fit comfortably within the space occupied by the largest doll. I feel this metaphor is accurate in describing American federal democracy: American government is composed of a number of independent sovereigns, each supreme in its own sphere, which operates under the umbrella of the sovereign superior to it. The sovereign is independent as to its own responsibilities and duties, but relies on the superior sovereign to resolve disputes and perform duties that lie outside the individual sovereigns' scope of power. Put more bluntly, cities fit into counties fit into states fit into the federal government; each is supreme in its own space, but each is also a component of a superior unit.

99. *See* Clinton, *supra* note 93, at 845 (describing the pre-colonial status of the Indian tribes to contrast with their impending annexation by the federal government).

100. *See id.* at 847. Clinton reports that "Native Americans were neither citizens nor subjects of the federal government or any states in which they might reside. They were, rather, members and citizens of a different nation – their tribe – and were subject to its governance in all matters of tribal affairs. This relationship bound them into a complex web of family, clan, religious and society relationships that defined Indian tribal allegiance." *Id.*

101. 30 U.S. (5 Pet.) 1 (1831).

102. *Id.* at 2.

103. *See id.* at 15.

104. *Id.* at 16.

used in the Constitution"[105] and whether "the Cherokee constitute a foreign state in the sense of the Constitution."[106]

The first issue addressed whether the Cherokee nation held the same sovereign status as Georgia or any other state. Chief Justice Marshall and a majority of the other justices accepted the argument, stating:

> [S]o much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. [The Cherokee] have been uniformly treated as a state from the settlement of our country... [t]he acts of our government plainly recognizes [sic] the Cherokee nation as a state, and the courts are bound by those acts.[107]

The second issue, whether the Cherokee constituted a foreign state in relation to the Constitution, reached a different conclusion. While Justice Marshall stated that the Indians "are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy,"[108] the status of the Indian nations was not on par with that of the nations of Britain or France:

> [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations.* They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.[109]

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105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 17-18 (emphasis added).

The Court ultimately held that since an Indian tribe was not a "foreign state in the sense of the constitution," it could not maintain its action before the Supreme Court.[110] For this reason, and because the injunction sought by the Cherokee would improperly constrain the actions of the Georgia legislature,[111] the motion for injunction was denied.[112] Robert N. Clinton offers another interpretation of the outcome of the case, and argues that the Indians "were neither citizens nor subjects of the federal government or any states in which they might reside. . .. They were, rather, members and citizens of a different nation – their tribe – and were subject to its governance in all matters of tribal affairs."[113]

Worcester v. Georgia[114] was the next major case to address the issue of the extent of Indian sovereignty. Although the immediate issue involved a missionary in the Cherokee Nation's territory who had refused to swear allegiance to the state of Georgia, the case unfolded against a much more complicated backdrop: the right of states to enforce their laws upon the territory of Indian nations.[115] The petitioner argued that the state of Georgia could not charge him for violations of Georgia law committed within the boundaries of the Cherokee nation, since the nation lay outside Georgia's jurisdiction.[116]

The Court held that even though the lands of the Cherokee were encompassed by the state of Georgia, Georgia nevertheless lacked the power to assert its authority over the Cherokee, and nullified the Georgia law.[117] The Court did so by recognizing that:

> [T]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and

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110. *Id.* at 21.

111. See *id.* at 19-20.

112. *See id.* at 20.

113. Clinton, *supra* note 93, at 847.

114. 31 U. S. (6 Pet.) 515 (1832).

115. *See id.* at 582-29; *see also* Perdue, *supra* note 4, at 108-11. Beginning in 1827, the Georgia legislature began enacting a series of punitive laws affecting the Indian nations. *See id.* Their intent was to make life in the nations so intolerable the Indians would leave and relocate making land available for white citizens. *See id.* Despite the ruling in *Worcester v. Georgia*, the state simply ignored the decision. *See id.*

116. *See Worcester*, 31 U.S. at 539.

117. *See id.* at 562-63.

> sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.[118]

The Court also looked to the law of nations, which generally recognized a weaker sovereign's right to retain some form of autonomy, even after associating itself with a stronger sovereign.[119] Justice Marshall concluded by stating that the Cherokee Nation, a distinct community with a distinct territory, was outside the realm of Georgia law; ultimately, the relationship between the United States and the Cherokee existed through federal law.[120]

The actions of the state of Georgia in *Worcester* were representative of many states' efforts to assert political authority over the tribes by outlawing tribal government.[121] As a result, the tribes sought to protect their political autonomy and prevent their absorption into non-Indian governments by signing treaties stating that the affected tribe would never be included in, or made subject to, the laws of the state or federal territory.[122] Thereafter, many treaties included provisions through which the federal government extended tribal political hegemony to persons and property within the tribal boundaries, as exemplified in language contained in a treaty drawn between the federal government and the Choctaw tribe of Mississippi:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People, the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except as may, and which have been en-

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118. *Id.* at 559.

119. *See id.* at 560-61. It is possible for a state to subordinate itself to a more powerful entity for purposes of protection without losing the right to government or state-hood. *See id.* at 561.

120. *See id.* at 561.

121. *See* Clinton, *supra* note 93, at 848-49.

122. *See id.* at 849.

acted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian affairs.[123]

The passage of the Fourteenth Amendment in 1868, which granted citizenship to all persons born or naturalized within the United States, was insufficient to override the prevailing legal history and mutual wishes of both the federal government and the Indian tribes with regard to sovereignty. One of the first post-Fourteenth Amendment cases to address the nature of tribal sovereignty was *Elk v. Wilkins*, which involved an Indian plaintiff whose attempt to register as a voter in the City of Omaha, Nebraska was denied.[124] The plaintiff argued that, because he was born in the United States, had severed ties to his tribe, and had completely surrendered himself to the jurisdiction of the United States, he was a full citizen of the United States by virtue of the Fourteenth Amendment; thus, he claimed entitlement to the right to vote.[125] The court held that the Fourteenth Amendment did not make Indians citizens of the United States, regardless of current tribal membership status.[126]

While the majority of the Court ruled against the plaintiff, the dissent is noteworthy because it contains a primordial attempt to narrowly apply the Fourteenth Amendment to individual Indians.[127] While Justice Harlan's dissent hardly constitutes a direct assault upon the notion of Indian sovereignty and does not call for a blanket application of the Fourteenth Amendment to tribal rule, it does seek to impose some limits on the extent of a tribal sovereignty with regard to individual Indians.[128]

Justice Harlan dissented from the majority based largely upon the wording of the first section of the Civil Rights Act of 1866, which states that the term "citizen" encompasses "all persons born in the United States, and not subject to any foreign power, *excluding Indians not taxed.*"[129] Justice Harlan, with whom Justice Woods concurred, argued that since the plaintiff had disassociated himself from his tribe, and was paying taxes to his tribe, the Act of 1866 encompassed the plaintiff and others similarly placed.[130]

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123. *Id.* at 849-50 (quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, U.S. & Choctaw, art. 4, 7 Stat. 333).

124. *See* Elk v. Wilkins, 112 U.S. 94 (1884).

125. *See id.* at 94-95.

126. *See id.* at 109.

127. *See id.* at 110-23 (Harlan, J., dissenting).

128. *See id.* at 110-23 (Harlan, J., dissenting).

129. *See id.* at 110 (Harlan J., dissenting) (quoting the majority opinion) (emphasis added).

130. *See id.* at 114 (Harlan, J., dissenting). Justice Harlan stated that "[t]he entire debate shows, with singular clearness, indeed, with absolute certainty, that no Senator who participated in [the passage of the act of 1866], whether in favor or in opposition to the

Justices Harlan and Woods also directly addressed the Fourteenth Amendment issue, which in section one[131] contains no mention of the "Indians not taxed" exclusionary clause of the Act of 1866.[132] Harlan and Woods concluded, based upon the debates that proceeded the Fourteenth Amendment's passage, that it was intended to cover persons such as the plaintiff. The Justices decided that "[a] careful examination . . . justifies us in saying that . . . [the Fourteenth Amendment] granted, and was intended to grant, national citizenship to every . . . [American Indian] who was unconnected with any tribe, and who resided . . . outside of Indian reservations and within one of the States or Territories of the Union."[133]

In 1887, Congress passed the General Allotment Act, a law that reflected the then-prevailing trend of tribal assimilation into American society and the obliteration of their independent political mechanisms as a desired goal.[134] According to Robert N. Clinton, tribal consent to laws had become merely a formal ritual,[135] and the federal government proceeded to use this and other measures to dissolve tribal political sovereignty. In an effort to break down tribal societies, allotment policies

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measure, doubted that the bill, as passed, admitted, and was intended to admit, to national citizenship Indians who abandoned their tribal relations and became residents of one of the states or Territories, within the full jurisdiction of the United States. It was so interpreted by President Johnson, who, in his veto message, said: 'By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.'" (alteration added) *Id.*

131. *See* U.S. CONST. amend. XIV § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

132. *See Elk*, 112 U.S. at 118 (Harlan, J., dissenting) (discussing how the "Indians not taxed" statement of the Act of 1866 came to be excluded from the text of the Fourteenth Amendment).

133. *Id.*

134. *See* General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 461-79 (1988)); *see also* Clinton, *supra* note 93, at 852-53. One of the federal government's goals in the latter half of the nineteenth century regarding Indian treaties was the assimilation of the Indians "into the economic, social and political fabric of the American polity by converting them into Thomas Jefferson's image of the backbone of the American democracy, the yeoman farmer. . . more importantly, the nomadic way of life of some of these tribes posed threats to the agricultural land ownership patterns of the encroaching Euro-American settlers. . . these initial treaty provisions not only held out amalgamation into American economic life for those tribes that 'voluntarily' submitted, they also sometimes affirmatively envisioned the dissolution or restructuring of tribal societies along more individualistic lines." *Id.*

135. *See* Clinton, *supra* note 93, at 853.

substituted "both different economic ways of life and new political allegiances" for traditional components of tribal existence.[136] The results of which were often less than successful. One measure offered full U.S. citizenship to Indians from nomadic hunter-gatherer tribes, if they were willing to abandon their traditional way of life and adopt a more sedentary, agrarian existence.[137] The federal government then abandoned all pretense of obtaining tribal acquiescence to laws when it passed the Citizenship Act of 1924.[138] This law made all Indians and Alaska natives full citizens of the United States, regardless of their feelings or desires in the matter.[139]

Tribal sovereignty continues to be a very murky and often contentious issue today. The position of the tribes (as reflected through their advocacy groups) is one favoring a very expansive and pure view. One such group, the American Indian Research and Policy Institute (hereinafter "AIRPI"), has made available online a report that provides "information that will help tribal leaders focus on and defend the sovereign status of Indian tribes."[140] The report is an in-depth examination of what the AIRPI perceives to be the greatest threats to tribal sovereignty.[141] Another major Native American advocacy group, the National Congress of American Indians (hereinafter "NCAI"), likewise advocates a strong, expansive and inviolable view of tribal sovereignty. Among its resolutions, the NCAI has supported the absolute authority of tribal governments in Alaska,[142] federal legislation to treat Indian tribes equally with other

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136. *Id.*

137. *See id.* at 852-53.

138. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253 (1925) (codified as amended 8 U.S.C. § 1401(b) (1988)).

139. *See* Clinton, *supra* note 93, at 854.

140. *See* American Indian Research and Policy Institute, *Threats to Tribal Challenge* (last visited at Oct. 3, 2000), *at* http:///www.airpi.org/st98promise.html.

141. *See* American Indian Research and Policy Institute, *Threats to Tribal Sovereignty: Yesterday's Promise–Today's Challenge, available at* http://www.airpi.org/st98fund.html (last visited Oct. 3, 2000). The site indicates that "[d]espite clear sovereignty of Indian tribes. . . the fact remains that Indian people are not just another racial minority group – they are a people who have retained a unique aboriginal sovereign status." *Id.*

142. *See* The National Congress of American Indians Resolution #JUN-00-32, *Support Federal Legislation Calling for Recognition of Hawaiian Nation and Return of Land to the Hawaiian Nation, available at* http://www.ncai.org/NCAIResolutions/Midyr2000/midyr0032.html (last visited Oct. 4, 2000). The Resolution reads as follows: "WHEREAS, prior to the arrival of western society Alaska and America's aboriginal inhabitants had chosen jurisdictions, whose leaderships made laws and rules to govern every person and aspect of life of that particular community, including but not limited to, determining land mass, domestic relations, natural resources, punishment for crime, protection of people, protection of environment, and social structure; and. . . WHEREAS, nowhere in the past 550 years, or in Alaska's 250 years of contact, nor by any law approved or disapproved or supported by the aboriginal inhabitants of Alaska, did any Alaska native Government give

American governments,[143] and federal legislation calling for recognition of and return of land to the Hawaiian Nation.[144]

One cannot underestimate the strength and passion that the issue of sovereignty arouses among American Indians. For instance, the NCIA web page lists the resolutions it has adopted at its sessions in 1999 and 2000.[145] Nearly all of these resolutions begin with a preamble stating "WHEREAS we, the members of the National Congress of American Indians of the United States . . . in order to preserve for ourselves and our descendents the *inherent sovereign rights* of our Indian nations, rights secured under Indian treaties and agreements with the United States. . .."[146] For many Indians, sovereignty is an emotional as well as political issue, and is often regarded as an inseparable component of their identity as Indians.[147] So powerful is the issue of tribal sovereignty among Indians that dissent from within is rarely tolerated, and there have been reprisals in the past against tribal members who have questioned the status quo.[148]

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up any right to have exclusive jurisdiction to govern village affairs, some of which we noted above, regardless of their proximity to western society towns, boroughs, municipalities and/or cities." *Id.*

143. *See* The National Congress of American Indians, Resolution #JUN-00-022, NCIA Support for Amendment to the Federal Unemployment Tax Act to Treat Indian Tribes Equally with Other Governments, adopted June 25-28, 2000 *at* http://www.ncai.org/NCAIResolutions/Midyr2000/midyr00022.html (last visited Oct. 4, 2000). The Resolution reads as follows: "NOW, THEREFORE, BE IT RESOLVED, that NCAI supports NIGA's [the National Indian Gaming Association] continued advocacy seeking to amend FUTA [the Federal Unemployment Tax Act] to treat Indian tribes on an equal basis with other governments within the United States and will assist NIGA's staff to the extent that NCAI has resourced available, and further desires that NIGA's efforts in this regard be seen as the joint efforts of NCAI and NIGA." *Id.*

144. *See* Resolution #JUN-00-032, *supra* note 141.

145. *See id.*

146. *See id.* (emphasis added).

147. *See* Richard A. Monette, *Sovereignty and Survival: The Status of Indian Tribes Under American Law is a Key to Their Cultural Existence*, 84 A.B.A. J. 64, 64 (2000) (describing the experience a young Anishinabe attorney had when he sought to gain a better understanding of what tribal sovereignty was. "Upon retreating to his tribe's territory – his 'reservation' - he shared with elders [his desire to understand what tribal sovereignty was]; a grandfather arose, drew a line in the sand and, pointing to one side of the line and then the other, declared, '[t]hat's the state of North Dakota, and this is Indian country. And that's sovereignty.' A grandmother arose, pressed the nails of both hands against her chest, and said simply, '[t]his is sovereignty.'").

148. *See* Sean Paige, *Gambling on the Future*, INSIGHT ON THE NEWS, Dec. 22, 1997, at 8. One such experience is exemplified by Bill Lawrence, a member of the Red Lake band of Chippaws of Minnesota and the publisher of the Native American Press/Ojibwe News. *See id.* Lawrence ran investigative stories on corruption among Indian officials that resulted in the criminal convictions of eight state tribal leaders. *See id.* As a result, Paige's newspaper was boycotted by tribal casinos, his wife was fired from her teaching job at a

It is worth noting that while the Supreme Court has already held that Indian tribes are not directly analogous to nations in the international sense,[149] many Indian tribes and their advocacy groups adhere to a vision of sovereignty similar to that enjoyed by foreign states.[150] While this view persists, the concept of sovereignty among the world's nations is undergoing a radical metamorphosis; indeed, recent events suggest that the world is shifting away from the notion of sovereignty as completely absolute.

In the context of relations among foreign states, immunity from "legislative, judicial and enforcement jurisdiction"[151] has been extended to diplomats[152] and heads of state.[153] A symbiotic component of the head-of-state immunity was the act of state doctrine, which is based upon the

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tribal school, and he was subject to personal derision and referred to as an "Indian Uncle Tom." *See id.* Paige quotes Lawrence as saying, "the biggest abusers and exploiters of Indians are other Indian people." *Id.* Lawrence goes on to say that "reservations won't become more democratic or accountable until they no longer can hide behide claims of absolute sovereignty. . . You have to pierce the veil; they can't have this absolute control," Lawrence says of tribal leaders. *Id.* "They've been hiding their criminal conduct behind it for years." *Id.*

149. *See Cherokee Nation*, 30 U.S. at 17-18.

150. *See* Monette, *supra* note 147. The prevailing feeling among Indian tribes regarding the extent of sovereignty is that sovereignty represents both territory and peoples. *See id.* This lesson reflects the prevailing notion of sovereignty in the world today. *See id.* On the international plane, sovereignty inures to the state, the basic socio-political entity, with a relatively well-defined territory and peoples whose cultural markers distinguish them from others as a nation. *See id.* The actual state of sovereignty also requires that the integrity of both the territory and the peoples be recognized and respected by other sovereigns. *See id.* Thus, tribal sovereignty is no different from the sovereignty of any other state, nation or peoples. *See id.* Natives view their tribal sovereignty much the same as any American views the sovereignty of the union and its respective states. *See id. See also* American Indian Research and Policy Institute, *supra* note 139. "Treaties were agreements between sovereign nations that granted special peace, alliance, trade and land rights to the newcomers. Indian governments used treaties to confirm and retain rights such as the sovereign right of self-government, fishing and hunting rights and jurisdictional rights over their lands. . .. Treaties did not, as is commonly assumed, grant rights to the Indians from the United States. Tribes ceded certain rights to the United States government and reserved rights they never gave away." *Id.*

151. Michael P. Davis, Note, *Accountability And World Leadership: Impugning Sovereign Immunity*, 1999 U. ILL. L. REV. 1357, 1362 (2000) (citing LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 1126 (3d ed. 1993)).

152. *See id.* at 1362-63 (citing Wilson v. Blanco, 4 N.Y.S. 714, 714 (1889) (alteration in original) (citation omitted) (stating that "[t]he more recent theory of extraterritoriality 'derives support from the legal fiction that an ambassador is not an inhabitant of the country to which he is accredited but of the country of his origin and the sovereign he represents, and within whose territory he *always* resides'").

153. *See id.* at 1363 (identifying head-of-state immunity as a customary international law principle by which "each state protects the immunity concept so that its own head-of-state will be protected when he or she is abroad"); *see also* Shobha Varughese George,

principle that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[154] While the act of state doctrine remains largely undiluted today,[155] the immunity given to a state or its leaders is no longer absolute.

For example, on October 16, 1998, former Chilean dictator Augosto Pinochet was arrested by British authorities while undergoing medical treatment in London.[156] The arrest was based upon a Spanish warrant seeking extradition of Pinochet to Spain to face charges of murder, torture and genocide during his 17-year rule of Chile.[157] The Chilean government and Pinochet's lawyers objected strenuously to Pinochet's arrest, asserting violations of Chile's national sovereignty[158] and Pinochet's immunity as a head of state.[159] Twice the British courts overruled Pinochet's objections, and held that Pinochet could be extradited to Spain.[160] The basis for Spain's extradition request[161] and the principal reasoning for the British court's extradition was the concept of "universal jurisdiction,"[162] which has gained greater acceptance and recognition in recent years.[163]

Note, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1055 (1995).

154. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

155. *See* Davis, *supra* note 151, at 1364 (citing to RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443(1) (1987)). "In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from. . . sitting in judgment on . . . acts of a governmental character done by a foreign state within its own territory and applicable there." *Id.*

156. *See Several Bids Are Begun to Aid Pinochet; Chilean President, Lawyers Seek Release*, CHI. TRIB., Oct. 23, 1998, at N24 (stating when General Pinochet was arrested in Britain).

157. *See id.*

158. *See* Bringing Pinochet to Justice; International and Political Factors That May Impact the UK's Efforts to Try Former Chilean Dictator Augosto Pinochet for Crimes Against Humanity, THE CHRISTIAN CENTURY, Dec. 23, 1998, at 1237 (describing the claims of the state of Chile and Pinochet as to why the former dictator was immune from extradition and trial in Spain).

159. *See id.*

160. *See* Davis, *supra* note 151, at 1361.

161. *See id.* at 1368-70.

162. *See id.* 1368.

163. *See id.* at 1368-69 (quoting Jeffrey Rabkin, Note, *Universal Justice: The Role of the Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2139 (1995)). The source asserts that "[t]he doctrine of universal jurisdiction provides that claims arising from universally condemned conduct are within the subject matter jurisdiction of all courts, regardless of the location or nationality of the parties." *Id.* The doctrine was first developed to justify the assertion of jurisdiction over pirates who, by definition, were

The purpose of the preceding discussion was not to delve into an extensive in-depth discussion of the nature of international law, nor was it meant to suggest that whatever acts Indian tribes commit under cloak of their sovereignty is in any way commensurate with the misdeeds of the Pinochet regime or crimes against humanity in general. Rather, the purpose was to illustrate that sovereignty has, at least on the international level, surrendered some of its absolute nature.

Despite Congress' blanket grant of United States citizenship to its native people, the government has not fully resolved the issue of whether the Constitution is wholly applicable to the internal relations of Indian tribes. However, such a determination has been clarified, somewhat, by the passage of the Indian Civil Rights Act.

V: THE INDIAN CIVIL RIGHTS ACT[164]

Why is there a need for a separate Bill of Rights for Indians? After all, if the U.S. Constitution provides protection to all Americans, then surely the first Americans are covered under its umbrella. However, such a simple analysis fails when one realizes that the structures of federal, state and municipal governments of this country, and those of the Indian tribe, are not directly analogous to one another.

The Indian Civil Rights Act was created with the assumption that "absent imposition by statute, even fundamental guarantees of the Constitution [did] not protect Indians in relations with their tribes, and that Congress should cure by statute the lack of Indian civil rights under the Constitution."[165] ICRA had its roots in a rider to House Resolution 2516, which "was originally aimed at *expanding protections*" established by federal civil rights legislation.[166] Congressional debate regarding the passage of an Indian Bill of Rights arose in the 1960s, a time when much attention in Congress and the nation as a whole was focused on the expansion and protection of civil rights for minorities.

Lawmakers acknowledged early on the dissimilarity between tribal councils and non-Indian governing bodies.[167] Colorado Representative Wayne N. Aspinall, in debating a provision of H.R. 2516, a matter regard-

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outside the territorial jurisdiction of any particular country but were, at the same time, a burden on all nations. *See id.* at 2140. The doctrine of Universal Jurisdiction has also been recognized by American Courts in regards to acts such as official torture and genocide. *See* Demjanjuk v. Petovsky, 776 F.2d 571, 582-83 (6th Cir. 1985) (holding that genocide is a 'universal tort' that can be claimed in any nation's courts).

164. 25 U.S.C.A. ch.15 §§ 1301-1303 (West Supp. 2000).

165. J. Kenneth Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617, 621 (1968).

166. *Id.* at 617 (emphasis added).

167. *See id.* at 618.

ing the appointment of counsel to Indian defendants in criminal matters before a tribal court, noted that:

> One provision of title II [of H.R. 2516] provides that in an Indian tribal court a defendant in a criminal case shall be entitled to the assistance of counsel. In an ordinary court of law this would, of course, be a highly desirable provision. *A tribal court, however, is not an ordinary court.* Neither the judges nor the prosecutors are attorneys. They function in a most informal matter. The fear expressed, which I believe should be evaluated, is that a defense lawyer in that kind of court would so confuse the lay judges with formalistic demands that the system might collapse.[168]

There were other differences that made the direct application of constitutional restrictions to the tribes unpalatable to many lawmakers, Indian and non-Indian alike. The reasons for this differentiation stems from the very origins of the Indians' relationship with the federal American government. In its purest form, this relationship comports with the ages-old conflict between the conqueror and the conquered. In short, the "American Indians . . . have been asked (or compelled) to surrender a simple free existence under tribal or family government on land they were free to roam at will, for a way of life which they have never sought, nor accepted, as better than their own."[169]

The original text of Title II, as first proposed in Senate Bill 961, stated "any Indian tribe in exercising its powers of local government shall, with certain exceptions, be subject to the same limitations and restraints as those which are imposed on the government of the United States by the Constitution."[170] The wording of Senate Bill 961 came under criticism because its wording and sweeping coverage failed to acknowledge "the Indians' economic and social condition, his customs, his beliefs, and his attitudes."[171] Frank J. Berry, Solicitor of the Department of the Interior, summarized one main reason for the failure to establish a nexus between "American federal law and tribal law":

> [T]he Constitution of the United States was adopted by a people whose philosophical and political roots were deeply embedded in the history of England and of Western Europe. Many of the restrains and limitations on the United States contained in the U.S. Constitu-

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168. *Id.* (emphasis added).

169. *Id.* at 619 (*citing* Burton D. Fretz, *The Bill of Rights and the American Indian Tribal Governments*, 6 NATURAL RESOURCES J. 581, 586-87 (1966)).

170. *Id.* at 621, n.14 (quoting Hearings on S. 961-68 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. On the Judiciary, 89th Cong., 1st Sess. 1 (1965)).

171. *Id.* at 622.

> tion were an outgrowth of that history. On the other hand, the people of Indian tribes have their roots in an entirely different culture and it may be that the devices which appropriately protected the interests of the Anglo-American of the late 18th century, may not be appropriate to protect the Indian tribal member of the middle 20th century.[172]

Much of the rest of ICRA was thus drafted with awareness of, and sensitivity to, these differences. For example, Paragraph 1 of Title II is essentially a carbon copy of the first amendment; however, it excludes the prohibition against the establishment of a religion.[173] This exclusion is an acknowledgement of the fact that many Indian tribes are theocratic in nature.[174]

In its modern form, ICRA is codified in Title 25 of the U.S.C.A.[175] Section 1302 of 25 U.S.C.A. contains ten constitutional restrictions by which tribal governments must abide in their dealings with individual tribal members.[176] Generally, these restrictions read like the Bill of Rights; however, alterations reflect the understanding that the federal and state governments are not analogous to an Indian tribe.

Subsection One of § 1302 is a modified duplicate of the First Amendment, granting almost all the latter's rights, with the notable exception of the interference with the establishment of a religion.[177] Subsection Two is essentially a direct facsimile of the Fourth Amendment's prohibition on search and seizures without a warrant issued for just cause.[178]

Subsections Three, Four and Five are separate provisions, which encompass some of the guarantees provided by the Fifth Amendment. Subsection Three contains the Fifth Amendment's double-jeopardy prohibition.[179] Subsection Four contains the prohibition against self-incrimination.[180] Subsection Five prevents the tribe from taking an individual's property for public use without just compensation.[181]

Subsections Six through Ten are primarily, though not exclusively, related to criminal matters. Subsection Six is a modified version of the Sixth Amendment and contains the guarantee of a trial in criminal cases,

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172. *Id.* (citing Hearings on S. 961-68 and J.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. On the Judiciary, 89th Cong., 2d Sess. 9 (1966)).

173. *See id.* at 623.

174. *See id.*

175. *See* 25 U.S.C.A. ch.15 (West Supp. 2000).

176. *See id.* § 1302 (1-10).

177. *Compare* 25 U.S.C.A. § 1302(1) (West Supp. 2000) *with* U.S. CONST. amend I.

178. *Compare* 25 U.S.C.A. § 1302(2) (West Supp. 2000) *with* U.S. CONST. amend. IV.

179. *Compare* 25 U.S.C.S. § 1302(3) (West Supp. 2000) *with* U.S. CONST. amend. V.

180. *Compare* 25 U.S.C.A. § 1302(4) (West Supp 2000) *with* U.S. CONST. amend. V.

181. *Compare* 25 U.S.C.A. § 1302(5) (West Supp. 2000) *with* U.S. CONST. amend. V.

but leaves out three exceptions.[182] First, it does not contain the guarantee that a jury be composed of impartial jurors.[183] Second, it does not contain the guarantee that the crime shall be tried in the state and district in which it occurred.[184] Third, while Subsection Six entitles a defendant to counsel for his defense, the defendant, and not the tribe, is required to pay for defense counsel.[185]

Subsection Seven contains the Eighth Amendment's prohibition of excessive bail and cruel and unusual punishment, as well as a maximum sentence that a tribe can impose.[186] Subsection Eight is a concentrated version of the Fourteenth Amendment and only guarantees that a tribe shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."[187] Subsection Nine prohibits a tribe from passing any bill of attainder or ex post facto law,[188] and Subsection Ten prohibits the tribe from denying to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.[189]

Since its inception, ICRA has sought to maintain the precarious balance between respecting the rights of individual Indians and respecting the historical sovereignty enjoyed by tribes.[190] This struggle has become more challenging with the passage of the Indian Gaming Regulatory Act.

VI. THE INDIAN GAMING REGULATORY ACT

The Indian Gaming Regulatory Act (IGRA)[191] was enacted by Congress in 1988, following more than a decade of controversy between tribes and states over the ability of states to constrain on-reservation economic enterprises.[192] Controversy originated in the 1970s, as tribes sold tax exempt tobacco products on the reservation, which gave them a competitive

182. *Compare* 25 U.S.C.A. § 1302(6) (West Supp. 2000) *with* U.S. Const. amend. VI.

183. *See id.*

184. *See id.*

185. *See id.*

186. *See* 25 U.S.C.S. § 1302(7) (West Supp. 2000). A tribal court cannot impose conviction for any one offense, any penalty, or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both. *See id.*

187. *Compare* 25 U.S.C.A. § 1302(8) (West Supp. 2000) *with* U.S. CONST. amend. XIV.

188. *See* 25 U.S.C.A. § 1302(9) (West Supp. 2000).

189. *See id.* § 1302(10).

190. *Santa Clara Pueblo*, 436 U.S. at 62. Two competing purposes inherent the provisions of ICRA are the goals of strengthening the tribe and its individual tribal members and promoting the federal policy of advancing Indian self-government. *See id.*

191. 25 U.S.C.A. § 2701 (West Supp. 2000).

192. *See* Henderson, *supra* note 13.

advantage over non-Indian tobacco retailers.[193] In 1980, the U. S. Supreme Court's ruling in *Washington v. Confederated Colville Tribes*[194] resulted in the states' ability to collect taxes on these products.[195] As a result, many Indian tribes turned to bingo as a source of revenue.[196] This change to gaming revenue set the stage for a greater conflict with the states, particularly those states with public policies against gambling.

This new controversy was first addressed by the Supreme Court in *California v. Cabazon Band of Mission Indians.*[197] In *Cabazon*, two California Indian tribes were authorized by ordinance to operate bingo, draw poker, and other games on their respective reservations.[198] Their gaming operations were open to the public and drew a majority of non-Indian gamblers.[199] Conflict arose when California attempted to apply state law to the tribes' gaming operations.[200] Successful application of the California statute had drastically curtailed the amount of jackpots offered and strictly dictated the use of gaming profits.[201] California claimed that the tribes violated state statutes regulating bingo operations and sued the tribes to force compliance with state law.[202]

Unlike its previous decision in *Confederated Colville Tribes*, the Supreme Court ruled in favor of the California tribes and held that state regulation of a tribe's bingo enterprise would impermissibly interfere with tribal government.[203] The court based its ruling on the recognition of tribal sovereignty "over both their members and their territory,"[204] and that "tribal sovereignty is dependent on, and subordinate to, only the federal government, not the States."[205] However, the Court also provided that "state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided."[206] The Court further

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193. *See id.* at 11.

194. 447 U.S. 134, 151 (1980).

195. *See id.* at 155. The Court noted that principles of federal Indian law do not give tribes the right to provide a tax exemption to persons who would otherwise not be exempt elsewhere and held that the state could collect taxes from non-Indian cigarette purchasers on reservations because the burden on the reservation merchant in collecting the tax was "minimal. *See id.*

196. *See* Henderson, *supra* note 13, at 11.

197. 480 U.S. 202 (1987).

198. *See id.* at 204-05.

199. *See id.* at 205.

200. *See id.* Specifically, California attempted to apply the California Penal Code to the bingo games.

201. *See id.* at 204-05.

202. *See id.*

203. *See id.* at 220.

204. *Id.* at 207 (citing U.S. v. Mazurie, 419 U.S. 544, 557 (1975)).

205. *Id.* (citing *Washington*, 447 U.S. at 154).

206. *Id.*

concluded that because the state of California did not have a general prohibition against gambling within its boundaries,[207] and since the economic development represented by gaming enterprises was an integral component of tribal self-determination,[208] "state regulation would impermissibly infringe on tribal government."[209]

As a result of *Cabazon*, many states expressed concern over the potential ramifications of the Court's decision and appealed to Congress for some element of control over the matter.[210] IGRA was born in 1988 as a direct response to these concerns.[211] While IGRA did have as a policy objective the promotion of tribal economic development as a means to strengthen tribal government and attain economic self-sufficiency, it also placed restrictions on the extent of tribal sovereignty.[212]

IGRA divides gaming on Indian reservations into three classes. Class I gaming falls within the tribe's exclusive jurisdiction[213] and consists of "social games for prizes of minimal value."[214] The category of Class II gaming encompasses many of the primary income generators in tribal casinos, which includes bingo and certain types of card games.[215] Class III gaming is the residual catch-all category which encompasses any form of gambling that does not fit into the definitions of Class I or II;[216] Class III gaming is usually equated with casino gaming.[217]

IGRA limits Indian sovereignty by dictating that revenue generated by Class II gaming can only be used for five purposes: "to fund tribal government operations or programs; to provide for the general welfare of the Indian tribe and its members; to promote tribal economic development; to donate to charitable organizations; or to help fund operations of local government agencies."[218] One way tribes can "provide for the general welfare of the Indian tribe and its members" is to make regular disbursements of the casino revenues to registered members of the tribe.[219]

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207. *See id.* at 211.

208. *See id.* at 219. *See also* Henderson, *supra* note 13, at 11.

209. *Cabazon Band*, 480 U.S. at 222.

210. *See* Henderson, *supra* note 13, at 11.

211. 25 U.S.C.S. § 2702 (Law. Co-Op. 1995). *See also* Henderson, *supra* note 13, at 11.

212. *See* Henderson, *supra* note 13, at 11.

213. *See* 25 U.S.C.S. § 2710(a)(1) (Law. Co-Op. 1995).

214. *Id.* § 2703(6). *See also* Henderson, *supra* note 13, at 11.

215. *See* 25 U.S.C.S. § 2703(7)(A)(i)(ii) (Law. Co-op. 1995); *see also* Henderson, *supra* note 13, at 11.

216. *See* 25 U.S.C.S. § 2703(8) (Law. Co-op. 1995).

217. *See* Henderson, *supra* note 13, at 12.

218. 25 U.S.C.S. § 2710(b)(2)(B) (Law. Co-op. 1995).

219. *Id.* § 2710(b)(3).

Therefore, IGRA has created a new source of income for individual tribal members; income that stands as great incentive for seeking recognition of membership in a tribe that participates in gaming enterprises. It is therefore axiomatic that those who wield the authority to recognize who is and who is not a tribal member hold considerable power over the economic well-being of "questionable" tribal members. In light of this conclusion, the next issue to address is the extent of a tribe's right to determine its membership without interference or oversight from either the federal or state governments.

VII. TRIBAL MEMBERSHIP

Although the right to determine tribal membership is unquestionably within the purview of the tribe,[220] the determination of who may claim membership in a tribe today rests largely upon the issue of lineage. In more mechanical terms, legitimacy as a tribal member is determined by how much "Indian blood" one happens to possess.[221] If an individual carries enough blood to meet a standard set by either the tribe or the federal government, then that person is a member and entitled to all the benefits concomitant with tribal membership.[222]

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220. *See Santa Clara Pueblo*, 436 U.S. at 55 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559, 8 L. Ed. 483 (1832)). The *Worcester* Court held that "Indian tribes are 'distinct independent political communities retaining their original natural rights' in matters of local self-government." *Id. See also* Roff v. Burney, 168 U.S. 218, 222 (1897). The Court held that "the only restriction on the power of the Chickasaw Nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred." *Id.*

221. *See* Pickler, *supra* note 67. Most tribal constitutions require a certain blood quantum – or proportion of Indian lineage – for membership. *See id. See also* Siegel, *supra* note 67. Siegel summarizes Scott L. Peeler, a researcher of Indian genealogy: "Tribes set membership requirements. Being listed as Indian on a census or birth certificate is not enough. [The tribes] want proof that you are a direct descendent of someone on their membership rolls. . . . Most also stipulate a 'blood quantum.' The majority [of tribes] require that your ancestry be at least a quarter tribal. . . ." *Id.*

222. *See* Mark Neath, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 689, 694 (1995). As semi-sovereign nations, "Indian tribes have the authority to define their own citizenship requirements, although Congress may define the term Indian for purposes of federal recognition. Gaming success, however, has led tribes to favor a restrictive, race-based conception of tribal citizenship. Typical is the Revised Constitution of the Jicarilla Apache Tribe, which limits future tribal enrollment to 'persons of three-eights or more Jicarilla Apache Indian blood . . . whose mother or father is a member of the Jicarilla Apache Tribe.' Blood quantum tests act as a simple means of constraining population growth, thereby restricting the available pool of gaming revenue to existing tribal members." *Id.*

It is important to keep in mind that the current methods of determining membership status in a tribe are not creations of the tribes themselves, but are a creation of the federal government of the United States.[223] In her article, Judith Resnik comments on the current federally-imposed notion of tribal membership. She states that membership was a concept imposed upon the Indians by the federal government for a number of reasons; today, membership is restrictive in nature due to the limited pool of resources the federal government offers to those who are members of tribes.[224]

The membership scheme today is very heavily regulated and codified. Today, tribes generally use one or more of the following to determine membership: (1) blood quantum, (2) descendancy, (3) patrilineage, or (4) matrilineage.[225] This determination along racial lines is significant because it is the "yardstick" by which the Bureau of Indian Affairs ("BIA"), the federal agency largely responsible for determining Indian policy, decides who receives benefits reserved for Indians. For example, BIA operates under an eligibility policy which limits its service population to Indian people who: 1) have over one quarter or more Indian blood; 2) are

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223. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 719 (1989).

224. *See id.* at 719-20. *See also* 25 U.S.C. § 450b(a) (1982) (designating beneficiaries of Indian Self Determination and Education Assistance Act as including any 'member of an Indian tribe.'"); Shoeshone Tribes v. United States, 299 U.S. 476 (1937); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 513-20 (1976).

225. *See* Kathryn R. L. Rand and Steven A. Light, *Virtue or Vice: How IGRA Shapes the Politics of Native American Gaming, Sovereignty and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 412 (1997); *see also* Sharon O'Brien, *The Concept of Sovereignty: The Key to Indian Social Justice*, in AMERICAN INDIANS: SOCIAL JUSTICE AND PUBLIC POLICY (Donald E. Green & Thomas V. Tonnesen, eds. 1966); Nora Livesay, *Understanding the History of Tribal Enrollment*, American Indian Research and Policy Institute, *available at* http://www.airpi.org/enroll.html (last visited Oct. 2, 2000). "Blood quantum" is simply the percentage of Indian blood an individual has. *See id.* For instance, a person born to a full-blooded Apache Indian man and a European woman would have a blood quantum of fifty percent Apache. *See id.* In her article, Lovesay describes the basic mechanics of the blood quantum: "In 1887, under the General Allotment Act (also known as the Dawes Act), Congress adopted the blood quantum standard of one-half or more Indian blood. This meant that if an Indian could document that he (women were excluded) [had] one-half or more Indian blood, then he could receive 160 acres of tribal land. All other Indians were excluded regardless of their standing within the tribe." *Id. See also* JOSEPH B. ACEVES & H. GILL KING, INTRODUCTION TO ANTHROPOLOGY 342 (1979). The author defines patrilined descent as "[the individual] is related to men and women by descent from a common ancestor by means of a series of male links, i.e., the ancestor's son, his son's son, and so on," and matrilineal descent as "[the individual] is related to men and women by descent from a common ancestress by means of a series of female links." *Id.*

members of federally recognized tribes; and 3) live on or near an Indian reservation.[226]

The right of the tribe to set its own criteria for membership within the tribe was established in *Santa Clara Pueblo v. Martinez*.[227] The dispute in *Santa Clara* arose when the respondents, two members of the Santa Clara Pueblo tribe, brought suit against the tribe and its governor to enjoin them from enforcing a tribal law.[228] The law denied tribal membership to children born to member mothers who married outside the tribe.[229] In contrast, however, the same law allowed membership to children of male members who likewise married outside the tribe.[230] In *Santa Clara*, the respondent had wed a man from the Navajo Tribe.[231]

Due to the tribal law, the woman's daughter, because of her Navajo husband, was denied admission into the Santa Clara Pueblo tribe.[232] The respondent argued that the tribal ordinance violated Title I of the Indian Civil Rights Act of 1968,[233] namely, the provision which reads that "no Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws" or deprive any person of liberty or property without due process of law.[234] The respondent asserted that the tribal law discriminated on the basis of sex and ancestry in violation of the Act.[235] The petitioner tribe argued that the court in which the case was originally filed, the United States District Court for the District of New Mexico, lacked jurisdiction to try "intra-tribal controversies affecting matters of tribal self-government and sovereignty."[236] The tribe also argued that while ICRA does modify the substantial law applicable to the tribe, "Congress did not intend to authorize federal courts to review violations of its provisions except as they might arise on habeus corpus."[237]

While the district court dismissed the jurisdictional claim, it did find in favor of the tribe on the merits, holding that the Santa Clarans had tradi-

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226. *See* Rand and Light, *supra* note 224, at 413; *see also Tiguas Cut from Tribe Face Hardship*, *supra* note 65. The Tiguas are one of the few tribes in the United States that does not control its blood quantum determination by themselves; instead, they had theirs required quantum by an act of Congress in 1988 at one-eighth native blood. *See id.*

227. *See Santa Clara Pueblo*, 436 U.S. at 51.

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.* at 52.

232. *See id.*

233. *See id.* at 51.

234. *See id.* (quoting the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (1968)).

235. *See id.* at 51 (citing to 25 U.S.C. §§ 1301–1303 (1968)).

236. *Id.* at 53.

237. *Id.* at 58.

tionally passed on membership in the tribe through patrilineal links, and that such a seemingly-discriminatory mechanism was "basic to the tribe's survival as a cultural and economic entity."[238] In finding for the tribe, the district court concluded that, in the balance struck between the competing interests of the respondent and the tribe, the determination of that balance was best left to the Pueblo:

> [T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved. . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. . . . To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it.[239]

The U.S. Supreme Court ruled in favor of the tribe for a number of reasons. However, the primary basis for its ruling rested upon the long held notions of what sovereignty entailed: First, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[240] Second, "[t]his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit.'"[241] Third, "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"[242] In essence, Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers and "without Congressional authorization, the Indian nations are exempt from suit."[243] The court summarized its conclusions:

> [A]s we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members [is]

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238. *Id.* at 54.

239. *Id.* at 54 (alterations in original) (quoting Martinez v. Santa Clara Pueblo, 402 F.Supp. 5, 18-19 (D. N.M. 1975)).

240. *Id.* at 58 (citing Turner v. United States, 248 U.S. 354, 358 (1919); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1940); Puyallup Tribe, Inc. v. Washington Dept. of Game, 433 U.S. 165, 172-173 (1977)).

241. *Id.* at 58 (quoting United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940)).

242. *Id.* (citing United States v. Testan, 424 U.S. 392, 399 (1976), quoting United States v. King, 395 U.S. 1, 4 (1969)).

243. *Id.*

> correspondingly restrained. . ..Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions but unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.[244]

The *Santa Clara* ruling was hailed as a victory for tribal sovereignty; however, the dissent, delivered by Justice Jackson and White, used the testimony of witnesses before a Senate Subcommittee regarding deprivations of their rights by tribal governments to castigate the majority for failing to take these considerations into account. Witness testimony provides ominous foreshadowing of a future filled with Tigua-like episodes in which the tribe is accountable to no one but itself:

> [S]everal witnesses appearing before the Senate Subcommittee testified concerning deprivations of their rights by tribal authorities and their inability to gain relief. Mr. Frank Takes Gun, President of the Native American Church, for example, stated that 'the Indian is without an effective means to enforce whatever constitutional rights he may have in tribal proceedings instituted to deprive him of liberty or property. While I suppose abstractedly [sic] we might be said to enjoy [certain] rights. . . the blunt fact is that unless the tribal court elects to confer that right upon us we have no way of securing it."[245]

Further testimony at the same subcommittee hearings raised the specter that personal conflicts and favoritism between tribal rulers and members could lead to substantial rights violations:

> Miss Emily Schuler, who accompanied a former Governor of the Isleta Pueblo to the hearings. . . complained that '[t]he people get governors and sometimes they get power hungry and then the people have no rights at all,' to which Senator Ervin responded, 'Power hungry is a pretty good shorthand statement to show why the people of the United States drew up a Constitution. They wanted to compel their rulers to stay within the bounds of that Constitution and not let that hunger for power carry them outside it.'[246]

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244. *Id.* at 72.
245. *Id.* at 81.
246. *Id.* at 82.

Justice White states in his dissent that the court, "by denying a federal forum to Indians who allege that their rights under the ICRA have been denied by their tribes, substantially undermines a goal of the ICRA and in particular frustrates Title I's purpose of 'protecting individual Indians from arbitrary and unjust actions of tribal governments.[247]

Justice White saw some glimmer of hope through the examination of *Bell v. Hood*,[248] in which the Court noted that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[249] Justice White also stated "the fact that a statute is merely declarative and does not expressly provide for a cause of action to enforce its terms 'does not, of course, prevent a federal court from fashioning an effective equitable remedy.'"[250] Therefore, the Court can adjust the rules to prevent injustice.

Justice White concludes by calling attention to the real potential for abuse that exists among unaccountable tribes:

> In the case of the Santa Clara Pueblo. . . both legislative and judicial powers are vested in the same body, the Pueblo Council. . . to suggest that this tribal body is the "appropriate" forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress' desire to provide a means of redress to Indians aggrieved by their tribal leaders.[251]

If the majority opinion's view in *Santa Clara* is accepted, the reasons for drafting ICRA seem to have been defeated (assuming, as intimated by Justice White's dissent, that ICRA exists as a means to provide individual tribal members with redress and due process in disputes with their tribal governments). *Santa Clara* does not stand for the proposition that Indian sovereignty places all internal decisions of the tribe outside of the purview of federal scrutiny. For instance, the court relied on an earlier case, *Talton v. Mayes*,[252] to support the proposition that Congress has plenary authority to limit, modify or eliminate the powers of local self-government, which the tribes otherwise possess.[253] Title I of ICRA represents an exercise of that plenary authority by imposing certain restric-

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247. *Id.* at 73.

248. 327 U.S. 678 (1946).

249. *Id.* at 684.

250. *Santa Clara Pueblo*, 436 U.S. at 73 (1978) (White, J., dissenting) (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 n.13 (1968)).

251. *Id.* at 82 (White, J., dissenting).

252. 163 U.S. 376 (1896).

253. *See id.* at 384.

tions upon tribal governments similar, but not identical, to those found in the Bill of Rights and the Fourteenth Amendment.[254]

Two cases have called the *Santa Clara* ruling into doubt; yet, their disagreement falls short of fully challenging the Supreme Court's authority. *Davids v. Coyhids*,[255] decided in 1994, involved members of the Stockbridge-Munsee Community Band of Mohican Indians who filed suit against members of their tribal council, claiming IGRA violations.[256] While the court essentially held that tribal sovereign immunity barred the suit and reaffirmed historical recognition of the existence and extent of sovereign immunity,[257] it also noted an earlier Supreme Court case, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*,[258] in which the Court extended jurisdiction to actions seeking equitable relief.[259]

Both *Davids* and *Oklahoma Tax Comm'n* left *Santa Clara* intact; however, their challenge to *Santa Clara* is at least some indication that the federal government's extension of sovereign immunity to the tribe may not be as absolute as originally thought.

The second case, *Akins v. Penobscot Nation*,[260] notes the recognition that a tribe's sovereign immunity from actions seeking money damages does not necessarily invoke *Santa Clara*.[261] *Akins* involved a dispute between the Penobscot Indian nation and plaintiff Akins over the harvesting of timber on lands acquired by the tribe.[262] The tribe passed a law stating that only members of the tribe, who were also residents of the state of Maine, could gain "stumpage permits," or the legal right to harvest timber on land belonging to the tribe. Plaintiff was a recognized member of the tribe and a resident of the State of Alabama. Plaintiff sued the tribe, alleging that the new tribal rule violated his rights to due process.[263] The tribe claimed that its sovereign immunity precluded plaintiff from stating a cause of action on which recovery might be based. Plaintiff asserted that, in fact, the Fourteenth Amendment did apply, and

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254. *Santa Clara Pueblo*, 436 U.S. at 57. *See also* 25 U.S.C. § 1302 (West Supp. 2000). Section 1302 provides that "No Indian tribe exercising powers of self-government shall. . . deny to any person within its jurisdiction the equal protection of the laws or deprive any person of liberty or property without *due process of law*. . ." (emphasis added) *Id.*

255. 869 F. Supp. 1401 (E. D. Wis. 1994).

256. *See id.* at 1402.

257. *See id.* at 1405.

258. 498 U.S. 505 (1991).

259. *See id.* at 516.

260. 130 F.3d 482 (1st Cir. 1997).

261. *See id.* at 489.

262. *See id.* at 483.

263. *See id.* at 484.

that the stumpage right was created in conjunction with the state of Maine.

Plaintiff's Fourteenth Amendment argument notwithstanding, the district court concurred with the tribe and dismissed plaintiff's claim for failure to state a cause of action. Plaintiff appealed and lost again when the decision was affirmed. However, in affirming the lower court's decision, the 1st Circuit noted that the Penobscot Nation was not released from the duty to uphold civil rights,[264] and that through ICRA, Congress imposed "restrictions on tribal governments similar, but not identical, to those embodied in the Bill of Rights and the Fourteenth Amendment."[265] Despite these holdings, the Court passed up an opportunity to call *Santa Clara* into question by holding that Congress did not intend for ICRA to create implied causes of action to redress substantive rights in federal court.[266] In essence, "if this is an internal tribal matter [and the court agreed that it was], then the tribal court will have authority over the essence of the state constitutional claims."[267] Today, the ruling in *Santa Clara* remains largely undiluted.

VIII. SOLUTION

Throughout my writing, I have been aware of the extremely fine line that I have chosen to walk. On the one hand, I am not calling for the complete destruction of tribal sovereignty. Indigenous systems of government are just as much a part of the culture of a tribe as religious ceremonies or dances, and imposing foreign notions of government upon the tribe destroys a part of that tribe's heritage. However, greed and abuse of power are not unique to Western civilization. I originally concluded this paper in a cowardly manner, by simply restating what I thought was wrong and not proffering any solution. Insomnia and watching CNN at 3:00 a.m. challenged me to alter that conclusion. I contend that one possible solution can maintain the integrity of tribal sovereignty while also ensuring some measure of fairness, and protection, for the individual tribal member. The principles for this solution were born of tragic circumstances.

On December 21, 1988, Pan American Airlines Flight 103 exploded out of the sky and onto the Scottish village of Lockerbie.[268] The airplane

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264. *See id.*

265. *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 57 (1978)).

266. *See id.*

267. *Id.*

268. *See* Synopsis - Air Accidents Investigation Branch, Aircraft Accident Report No 2/90 (EW/C1094) Report on the accident to Boeing 747-121, N739PA at Lockerbie, Dumfriesshire, Scotland on December 21, 1988 (last visited Sept. 11, 2000) http://www.open.gov.uk/aaib/n739pa.html).

crashed, killing 243 passengers, 16 crewmembers, and an additional 11 people who were killed when flight wreckage slammed into the Scottish earth.[269] By the Fall of 1989, local authorities working with the FBI had identified suspects and determined that a bomb had caused the explosion.[270] The United States, Britain and France had issued arrest warrants for six Libyan agents by December 1991.[271]

Libyan leader Moamar Qadhafi initially balked at demands to turn over the suspects.[272] However, after scores of sanctions crippled the Lybian economy for much of the 1990s,[273] Libya accepted a plan by the United States and Britain to put two suspects on trial in the Netherlands.[274] Under the terms of this compromise agreement, the suspects were to be tried at an abandoned air base in The Netherlands by a tribunal composed of Scottish judges applying Scottish law.[275]

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269. *See* Factual Information - 1.1 History of the Flight - Air Accidents Investigation Branch, Aircraft Accident Report No 2/90 (EW/C1094) Report on the Accident to Boeing 747-121, N739PA at Lockerbie, Dumfriesshire, Scotland on 21December 1988 (last visited Sept. 11, 2000) http://www.open.gov.uk/aaib/n739pa.html).

270. *See* Brian Duffy, *On The Trail of Terror: Despite the Infighting Among Intelligence Agencies, the 'Hicks' From Scotland are Closing in on Those Who Bombed Pan Am 103*, U.S. NEWS & WORLD REPORT, Nov. 13, 1989, at 44 (describing the combined efforts of Scottish, American and other nations' intelligence agencies in determining the cause of the Pan Am 103 disaster).

271. Eldad Beck, *The Weakest Link: Experts in Europe Cast Doubt on Qadhafi's Responsibility for Two Airline Bombings*, THE JERUSALEM REPORT, Dec. 5, 1991, at 31 (describing the possible involvement of Lybian agents in the bombing of Pan Am 103).

272. See Michael Evans, *Gadaffi Rejects Call on Pan Am Suspects*, TIMES NEWSPAPERS LIMITED, Nov. 29, 1991.

273. *See* Lee Michael Katz, *U.N. Sanctions Press Libya*, USA TODAY, Apr. 1, 1992, at 1A (describing the effects of the first round of U.N. sanctions: a ban on airline flights and arms sales to Libya; compensation for the victims; and expulsion of Libyan diplomats); *see also* Andrew Katell, *UN Pressures Libya on Pan Am Bombing; New Sanctions Passed to Force Suspects' Surrender*, CHI. SUN-TIMES, Nov. 11, 1993, at News1 (describing further penalties imposed upon Libya for its refusal to turn over the Pan Am 103 suspects: a freeze on Libya's financial assets in foreign banks and a prohibition on the sale of foreign oil equipment); *see also* Richard Z. Chesnoff, *He Just Keeps on Ticking*, U.S. NEWS & WORLD REPORT, Feb. 21, 1994, at 55 (describing the effects of sanctions: "Air transport to or from the desert land has been banned since 1992, causing massive traffic jams and deadly accidents on the highways leading to Egypt and Tunisia. Spare parts fordomestic [sic] flights are also embargoed, along with equipment for the petroleum industry and for the Libyan military. And as of last December, most of Libya's billion dollars in known foreign assets had been frozen solid. . . the once powerful Libyan dinar, still officially valued at $3, now fetches as little as 33 cents on a thriving black market.")

274. Thomas W. Lippman and John M. Goshko, *Libya OKs Hague trial for Pan Am Suspects*, CHI. SUN-TIMES, Aug. 27, 1998, at 27.

275. *See* George Gedda, *Libya Told, 'Take it or leave it' on Trial Site*, CHI. SUN-TIMES, Aug. 24, 1998, at 3 (stating Secretary of State Madeleine Albright's description of the terms of the American-British compromise offer to Libya: "After consultatioons with the Netherlands, we have concluded that such a trial is indeed possible. Accordingly, we have

While it is arguable that Libya's acquiescence to the American and British compromise was mainly driven by economic concerns, at least some attention was given to the possibility of the Libyan suspects not receiving a fair trial in the U.S. or Britain.[276] Although the solution proposed by the United States and Britain was specifically crafted to address Libya's concerns regarding a fair trial, the basic concept may be applicable to the Indian reservations.

Any proposed solution must take into account two competing goals: the preservation of tribal autonomy and tribal culture, and the need to ensure justice for individual tribal members. Using the Lockerbie compromise as a model, it is not too difficult to imagine a tribunal created and administered by the federal government through the BIA or as a unit of the federal judiciary. This tribunal body would create a forum for individual tribal members to appeal decisions that involve tribal law, but which affect rights granted to individuals under the U.S. Constitution. This sacrifice of tribal sovereignty would be the "give" that tribal government would cede to the federal government in order to protect its members from oppressions of the tribal government.

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decided to go forward with the trial of the two suspects before a Scottish court, with Scottish judges applying Scottish law." If Libya accepts the compromise offer, sanctions would be suspended once the suspects are delivered to the Netherlands. If Libya refuses, efforts would be made to increase the sanctions.).

276. See David Sapsted, *UN Dismisses Lockerbie Suspects' Fair Trial Fear*, DAILY TELEGRAPH (London), Dec. 23, 1997, at 10. The article states that: "In a setback to [Colonel] Gaddafi's long-held position that the suspects would find it impossible to get a fair trial in either the Britain [sic] or America [emphasis added], a UN report published yesterday in New York states that accusations of prejudiced proceedings are groundless. Compiled by two international jurists, Prof Henry Schenners, of Leiden University, and Enoch Dumbutshena, former Zimbabwe chief justice, the report states "that the accused would receive a fair trial under the Scottish judicial system." Id. *See also* Lee Michael Katz, *Britain Rejects Neutral Site for Pan Am 103 Bomb Trial*, USA TODAY, Aug. 26, 1997, at 8A. Katz noted that Libya's United Nations ambassador, Abuzed Omar Dorda, wrote to U.S. Attorney General Janet Reno to say that the Libyan suspects would not receive a fair trial in Western courts. *See id.* Dorda alluded to Timothy McVeigh, the Oklahoma City bomber, whose trial was moved to Denver to avoid jury prejudice. *See id. See also* Socialist People's Libyan Arab Jamahiriya, *The Question of Lockerbie: Position Paper*, *at* http://www.un.int/libya/locker1.htm (reporting official Libyan reservations to the trial of the Pan Am 103 suspects in either Britain or the United States). The Libyan Arab Jamahiriya announced it had no objection to the two suspects appearing before the Scottish judiciary. *See id.* But, British, Scottish, and Americans defense lawyers for the suspects, warned them "against appearing in a court in any of the two countries because of the prior condemnation by the mass media, as well as by government officials in the two countries. *See id.* Moreover Libya believes that the two Libyan suspects in the Lockerbie accident, have also the right to stand before a just court at venue free from the atmosphere of prior condemnation prevalent in the United States and in Scotland, as is the case with their citizens, and as provided for in article 14 of the International Covenant on Civil and Political Rights. *See id.*

To counterweight this "give," the "take" side of the equation would require the tribunal to adhere to tribal law, whether codified on paper or practiced as a matter of custom. This compromise would still leave the individual tribe member subject to the sovereignty of tribal law and it would preserve the legal components of tribal culture. Moreover, such a tribunal would be removed from the prejudices and arbitrary whims of the tribal judiciaries. This removal of local influence would both guarantee a fair trial for the individual and preserve the integrity of the local law.

IX. CONCLUSION

When examined from a non-Indian, western perspective, the solutions to this dilemma seem blunt and simple: force the tribes, through an act of Congress, to be accountable to the U.S. Constitution. After all, Navajos, Cherokees, Nez Perces, Santa Clarans, Tiguas, Seminoles, Apaches, and Choctaws are members of their respective tribes; but, they are Americans as well. And just as a non-Indian city or state government owes its citizens a constitutionally guaranteed right to due process, so, too, should the tribes owe their members.

But such a solution ignores the greater dilemma affecting the United States' relations with its native peoples: while non-Indian Americans demand and expect certain rights because they are Americans, these native peoples never asked to be Americans. That status was thrust upon them after years of war, genocide, relocation and assimilation. Sovereignty and the respect of that power is the least America can offer to its subjugated peoples.

As time has progressed, attitudes have changed, and America now realizes that there is value in the different cultures of its indigenous peoples. These differences are worth preserving. That is why a full assault on the notion of tribal sovereignty would be counter-productive and a classic example of "destroying the village in order to save it."[277] It is

277. The quote "we had to destroy the village in order to save it" is attributed to an anonymous U.S. officer in Vietnam during the Tet Offensive. It has become symbolic of the absurdity of war, which calls for the destruction of that which the combatants seek to defend. *See* Aleksandra Priestfield, Vietnam: A Retrospective – *The Road to Wisdom, Swans, at* http://www.swans.com/library/art6/vnam02.html (last visited Oct. 3, 2000). The simplicity of the quote conveys a message so powerful that it is often used today to describe similar acts. *See* Gary Dempsey, *Destroying Serbia in Order to Save It,* Cato – Today's Commentary, *at* http://www. cato.org/dailys/06-08-99.html. Dempsey highlights the hypocrisy during the 1999 NATO air campaign against Serbia for its aggression in Kosovo, in which President Clinton insists that the United States "has 'no quarrel with the Serbian people,'" while bombing predominantly civilian targets. *See id.* Dempsey states "[p]erhaps [Gen. Klaus Naumann, chairman of NATO's military committee] intends to

through the exercise of sovereignty that many tribes have been able to maintain their cultural practices after years of federally sanctioned repression.

Like all human creations, tribal sovereignty in its current incarnation is not perfect. It has done a very capable job to preserve tribal culture and identity, but the absolute, unquestionable authority vested in the tribal governments has created the very situation which leads people to draft written constitutions. Bluntly put, there is just too much money and not enough accountability on many reservations for there not to be a repeat of what occurred on the Tigua reservation.

The greatest difficulty in coming to any solution is the historical context of the Indian in relation to the United States. The American federal government was neither wanted, needed, nor created by its indigenous peoples; rather, it was imposed upon them. The Fourteenth Amendment and other guarantees of the Constitution may be brilliant limitations on the power of government, but they are still products of the oppressor.

Despite this historical baggage, clear facts cannot be ignored: there is strong evidence that very serious wrongs were committed by the Tigua tribal government against Marty Silvas, Grace Vela and others; that contemporary notions of tribal sovereignty have left these individuals without any recourse to challenge their banishments; and their ability to do so is a right they would have possessed had they not been Tigua. Whether the Tigua represent the future of tribes awash in money, or are merely an aberration, is unknown. What is likely, however, is that the sour fruit of IGRA has not yet fully ripened. Therefore, American tribes which survived the 20th century must be accountable to two entities. They owe a duty to the world to maintain their laws, customs and culture. And, they owe a duty to their own tribal people to ensure that tribal law is enforced fairly and justly. These two goals are not axiomatically oppositional and need not be at odds with each other; the goals can be fulfilled.

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replace the Vietnam-era contradiction, '[w]e had to destroy the village in order to save it,' with '[w]e had to destroy the country in order to save it.'" *Id.* I feel that this quote is applicable to my position, that any attempt to resolve the lack of accountability under the current understanding of tribal autonomy, by doing away with tribal autonomy altogether, places indigenous customs and culture at sever risk of extinction.